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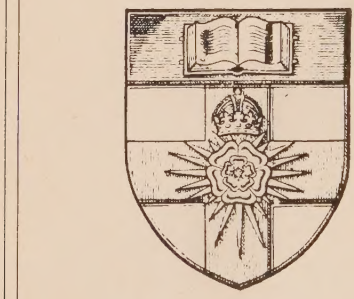

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CORRIGENDA.

Page 36, line 5, from foot, *for* "defendant" *read* "plaintiff."
Pages 268, 269. The counsel for Ingham and Fallon was *W. J. Johnston.*
Page 394, line 14, *for* "37 & 38," *read* "38 & 39."
,, 623, foot-note (1), *for* "Ir.," *read* "Times."

NOTE.

The COURT OF APPEAL have affirmed the decision of the LAND COMMISSION in ROBINSON, TENANT; WAKEFIELD, LANDLORD, [1896] 2 Ir. R. 194.

CASES

DETERMINED BY

THE QUEEN'S BENCH AND EXCHEQUER DIVISIONS

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND BY

THE IRISH LAND COMMISSION

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1896.

REG. (O'FERRAL) *v.* THE JUSTICES OF COUNTY MEATH (1).

Q. B. Div. 1895.

Jan. 23, 24, 28.

Tithe rentcharge—Application by "three or more persons" to vary—Application by two individuals, one of them applying as trustee of certain lands, and also as beneficial owner of other lands—"The corn principally grown"—Order based on price of wheat and oats taken together—Posting of statutory notices—Form of order—4 Geo. 4, c. 99, s. 43—1 & 2 Vict. c. 109, s. 32—Jurisdiction of justices—Order drawn up and signed, subsequently to the hearing and without adjournment, out of Quarter Sessions.

An application to vary a tithe rentcharge on notice signed by two individuals—one of them signing twice, once "as trustee for X Y" of certain lands, and again in his personal capacity as beneficial owner of other lands within the parish liable to the charge—is not an application by "three or more persons" within 1 & 2 Vict. c. 109, s. 32; and a writ of *certiorari* was issued accordingly, to quash an order of Quarter Sessions founded thereon,

(1) Before O'Brien, Johnson, Holmes, and Gibson, JJ.

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varying such tithe rentcharge, the Justices having had no jurisdiction to enter upon the inquiry in the absence of due notice as required by the statute.

Per O'Brien, J.: Where the certificate of composition is silent as to the species of corn on which it is based, it is competent to the Justices, on proper evidence, to vary tithe rentcharge on the basis of more than one species, *e.g.* "wheat and oats, as being the corn principally grown in the county"; and (the measure of these differing) the computation should be made on the average price of the barrel as a unit.

Justices at Quarter Sessions, having heard an application to vary tithe rentcharge, ruled that the applicants were entitled to an order reducing the charge on a certain basis of calculation, and (but without any order of adjournment) directed that a draft order should be prepared by the applicants and submitted to them, and that the clerk of the peace should make the necessary calculations to ascertain the amount of the reduction; and, subsequently, when the order had been so made up, signed same out of Quarter Sessions, though dated as of the day of the hearing:—

Held, per O'Brien, Holmes, and Gibson, JJ., that the terms of the order, and the amount of the variation, not having been publicly ascertained and declared at the sessions, or at an adjournment thereof, the order was bad, and should be quashed.

CERTIORARI.

Motion to make absolute a conditional order for a writ of *certiorari*, directed to the Chairman and Justices of county Meath, to remove and quash an order made by them varying a certain tithe rentcharge issuing out of the parish of Martry.

The order of the Justices, to which objection was taken, recited that due notice had been given "by three owners of land" in said parish, charged with the payment of sums of £3 and upwards each in respect of the rentcharge in lieu of compensation for tithes within the said parish, made by the certificate of W. H. Waller and P. O'Reilly, dated the 27th October, 1824; that "the said owners applied" to the Justices to have the average price of wheat or oats (as the said Justices should determine) for the seven years preceding the application inquired of and ascertained in order that the annual rentcharge in lieu of tithes might be varied accordingly; that the applicants and the lay impropriator of said tithes appeared by counsel and solicitor before them; that "due service and posting of" the required notices "and the signatures of the said owners thereto" were duly proved; that a copy of the

certificate of composition of 1824, certified by the proper officer of the Irish Land Commission, and sealed with the seal of the Commission was produced, as was also a copy extract (admitted by consent) from the *Dublin Gazette* for the seven years ending 1st November, 1821, and for the seven years preceding the application; that the price of corn was not stated in the said certificate of composition; that the average price, ascertained from the *Gazette*, "of corn, that is to say, wheat and oats, being the corn then principally grown in said county Meath," for the seven years ending 1st November, 1821, was "£1 4*s.* 10*d.* sterling, per barrel of 20 stone of wheat, and 14 stone of oats," and that "the average price of corn, that is to say, wheat and oats for the seven years preceding the application, as ascertained from the *Gazette*, was 14*s.* 10$\frac{3}{4}$*d.* per barrel of 20 stone of wheat and 14 stone of oats, being less by more than one-tenth than the average price for the said first-mentioned period": and ordered that "the annual rentcharge in lieu of composition for all tithes within the said parish of Martry" should be proportionately diminished, and that the assessment and applotment of such composition, and the rentcharges in lieu thereof, should be diminished in the proper proportion (the particulars being given in the order).

The conditional order set out a number of grounds of objection, alleging want and excess of jurisdiction, and that the order of the Justices was bad on its face as not showing jurisdiction in certain particulars. The substance of these objections, and the facts appearing on the affidavits in relation to them, were briefly as follows:—

1. That the notice of intention to apply was not signed by three persons, each charged with the payment of £3 and upwards of tithe rentcharge; that the order did not state that the notices had been so signed, and did not set out their names. It appeared that all the land in the parish subject to this charge was held, partly by William N. Waller as trustee for C. P. Tisdall, a minor, partly by the said William N. Waller in his own right, and the residue by James M'Cann. The lands, the legal estate in which was vested in Waller as trustee, were distinct from the lands held by him in his own right. The notices were signed "William N.

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Waller, trustee for C. P. Tisdall; James M'Cann; William N. Waller."

2. That the order was not made at Quarter Sessions.—It appeared that at the conclusion of the hearing at Quarter Sessions (before His Honor Judge Curran and R. R. Fitz Gerald, J.P.) the Chairman announced that they were satisfied that the applicants had complied with the requirements of the statutes, and that the tithe rentcharge should be reduced accordingly. He also stated that they were satisfied that wheat and oats were the principal corn grown in the county, and that, as the form of the order was of a technical nature, the Justices would ask the applicants' solicitor to draft same and submit it to them for approval and signature; and that they would ask the Clerk of the Crown and Peace to make the necessary calculations. The Court also suggested that the draft order should be submitted to the defendant's solicitor; but counsel for the defendant objected, stating that they could not approve of any draft order, as they disputed the jurisdiction of the Justices to make any order. There was no adjournment of the case; the order was subsequently drafted by the applicants' solicitor, and was made up and signed by the said Justices about the 16th August, 1894, out of Quarter Sessions, but bore date as of the day of the hearing.

3. That the order did not state that there was a parish church in Martry, nor that the notices were posted on the outer door thereof, nor that there was no parish church in Martry, nor a posting on all other known places of worship pursuant to the statutes; nor that the notices were posted on the principal outer door of the parish church, nor of all the places of worship in the parish on two successive Sundays, the last being not less than eight days before such Quarter Sessions.—It appeared that there was no church or known place of worship in the parish, and that the notices had been posted on the three nearest places of religious worship.

4. That the order did not state whether wheat *or* oats was the corn principally grown in the county in the judgment of the Commissioners for that purpose, or as a fact proved to the Justices; and that the order purported to diminish the tithe rencharge upon the price of wheat and oats taken together, and not on the price of

the species of corn on which the certificate was based.—The certificate of 1824 stated neither the price nor the species of corn on which it was based.

5. That the order did not state that the certificate of 1824 was signed by two duly appointed Commissioners, nor that the copy produced was a copy of the certificate alone made evidence by statute.—The copy produced was a copy, certified by the keeper of the records of the Land Commission, and sealed, of an original which purported to be signed by two duly appointed Commissioners, W. H. Waller, and P. O'Reilly.

William P. Ball, for the prosecutor (O'Ferral).

Campbell, Q.C., and *Matheson, Q.C.* (*Chaytor*, with them), for the respondents.

Reference was made during the argument to the following:—3 & 4 Geo. 4, c. 99; 1 & 2 Vict. c. 109; *Thompson* v. *Shiel* (1); *Norcott's Case* (2); *Crosthwaite* v. *Conlan* (3); *Langley Minors* (4); *Reg.* (*Murphy*) v. *Justices of Wexford* (5); *Fitzpatrick* v. *Pyne* (6); *Ex parte Johnson* (7); *Registrar-General* v. *Magee* (8); O'Leary on Tithes, Part 1, p. 54; Part 2, p. 70.

Cur. adv. vult.

Jan. 28.

O'BRIEN, J.:—

An order of Quarter Sessions for the revision of tithe rent-charge has been questioned by motion for *certiorari*, on many grounds, two alone of which, as I collect the opinion of the Court, possess any substance—namely, that the order was not made at the Sessions, but in part at least afterwards, and that the application was not made by three persons in conformity with the statute. But as several other points were strenuously argued—not to leave them wholly unnoticed—I consider it right to state that, in my view, it was not necessary, according to Mr. Ball's contention, to set out in the order the names of the applicants, or to define the

(1) 3 Ir. Eq. R. 135.
(2) 28 L. R. Ir. 185.
(3) 5 Ir. L. R. 534.
(4) 5 L. Rec. (N.S.) 41.
(5) [1894] 2 Ir. R. 81.
(6) 13 Ir. C. L. R. 32.
(7) 3 B. & S. 947.
(8) 32 L. R. Ir. 87.

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parish, otherwise than by name; that the proper legal evidence was given of the certificate of composition, by a certified copy from the Land Commission, which body has in fact the custody of the document; that Mr. Waller, one of the applicants, had the legal estate in certain of the lands, as taking under the execution of a power, which appointed the first use to him so that all the subsequent uses were trusts, and—being liable to pay the rent-charge, whether the *cestui que trust* was liable or not, and having in fact paid it, as was shown by the receipts amounting in themselves to an admission which dispensed with other evidence—was therefore qualified to join in the application; and lastly that it was not incumbent on the Sessions, in the case where there was no species of corn mentioned in the original certificate, to take one species alone as the measure of comparison, or to hold that the corn "principally grown" in the county meant the same thing as exclusively grown, which would lead to the direct absurdity, that, if there were several species of corn grown, that which was largest could be taken as the measure of the rentcharge, and the difference of price as to that alone taken into account, though greatly exceeded by all the rest together.

I agree, however, that if the statute lays down a particular course to be pursued, a specific measure of comparison, a specific mode of proof—as to that the function of the Sessions was purely ministerial, even though judicial in other respects, and that, if the course prescribed be not pursued, that amounts to want of jurisdiction, which is capable of being shown by affidavit, and would make the order bad. For instance—while their finding could not be questioned upon the matter of fact, as to what was the corn principally grown—if they had taken two species of corn, while one was mentioned in the certificate; if they had substituted evidence of the price of grain for the information of the *Gazette;* or in any manner departed in the calculation from the directions of the statute—that would be want of jurisdiction, and the order would be void in consequence. The Sessions are to execute a strictly statutory authority in the mode pointed out alone. That makes the difference between judicial functions, to which the law attributes conclusiveness, and ministerial acts, in which the statute is itself the judge. As to the objection that two species

of corn were taken as the basis, it is clear from the latter part of sect. 32 of the Act of 1 & 2 Vict. c. 109, that this was the right course, and if one alone were taken it would be as clearly wrong, while the Sessions still could not be deprived of the power of deciding that one alone was principally grown in the county.

Now, with respect to the time when the order was made, I take it to be certainly proved that no complete order was made on the 18th June, the day the written order bears date. The time is a fundamental matter of jurisdiction. That is clearly shown by the first Act, which allows the order to be made at an adjourned Sessions. Here there certainly was no adjournment. The order must be made in Court, with the guarantee of publicity, which the law considers the indispensable condition of all legal regularity. This order was ultimately made in private. We can only judge what an order is by what the statute requires the Sessions to do. They are to determine the amount of the compensation to be payable by the parish. They did not do that. Amount must be a thing expressed in figures; the figures were undoubtedly left out. It may be a mere sum in arithmetic remained—though the discussion presented conflicting views as to the results of the arithmetic—as to whether the computation by stones, in the combination of two unequal measures, would bring out a different ratio of price from that which I would take to be the mode of calculation resulting from the statute (4 Geo. 4, c. 99, sect. 43) as adopting a bulk amount of 20 stones, known in market by the collective name of barrel, as the unit of measure. But, at all events, the sum in arithmetic was not worked out. No one stated that £70 was ascertained as the amount to be in future payable. The rulings of the Sessions on the points of law were not the order. But if the counsel had made all other objections, and made none on the figures, the materials of which were then before the Court, and did not now suggest any erroneous result from the use of them, and if we did not see ourselves that any wrong was done in other respects, or that any mistake had found its way into the calculation—that would be the very case, in my opinion, which would still leave a place, narrowed more every day, for the discretion, more frequently asserted in theory than applied, of refusing *certiorari* on a mere technical ground, which would have

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the effect of casting a burthen on the applicants for several years, in opposition to unquestionable justice. On the other hand, if the Justices had abused the power of deciding matters of fact by making the greater fall in wheat, of which it was suggested there was not a pound grown in the county, the means of wrongfully affecting the amount of the reduction, the owner of the rent-charge would certainly be justified in insisting upon a technical inadvertence to avoid the order.

However, while stating this view, it is not necessary to act upon it. For, as to the other chief point, whether parcels could be reckoned for persons in the application, I considered the objection from the first insuperable. If the statute intended that one person could apply, no reason can be assigned that it did not say so. Likewise, no reason can be suggested, if that was the intention, why "three persons or more" should be mentioned—why the difference of number should be allowed in one direction only—in that of increase. No ordinary mind could understand that "three persons or more" was capable of meaning three persons or less. Why should the meaning of the Act be left to circuitous inference by taking the land for the person in opposition to plain language? Or, if one individual alone was to have the right, what would be the sense of requiring him to have three separate holdings subject to the rentcharge, and not an aggregate equal to three, if the amount was material? The change of language to "person" from "owner" is an argument against such a view; but if it were allowed to reverse the rule of construction, and say that "persons" in the later Act meant the same thing as "owners" in the first, I would certainly be of the opinion that "owners" also meant distinct persons. The first Act, according to which the proceeding must still be followed, required the names to be signed to the application. Estates could not sign names. The requirement is equally inconsistent with the idea of a person subdividing himself in nomenclature according to the character of his ownership. The applicant could not subdivide himself into trustee and owner, any more than sign three times for three parcels of land. Names are as distinct as persons. But really the thing is too palpable to pursue the absurdity into all its consequences. The intention is absolutely clear. The law, foreseeing that collision of interest

would occur between those who had to pay and those who had to receive tithe, intended to provide against the income of the clergy being exposed to attack from hostile interest, personal feeling, or vexatious singularity, by requiring the concurrence of several persons in order to alter the composition.

As to the doctrine on which *The Queen* v. *Sullivan* (1) is founded, and which was supposed to cover the defects in the present proceeding, that decision can have no such effect. The doctrine is based upon jurisdiction to entertain the matter in the first instance, and an order regular on the face of it; and excludes all question of intervening error in proceeding by way of *certiorari*. Here there was no legal application, and no legal order made at the sessions, and so the jurisdiction fails both in the beginning and at the end.

JOHNSON, J. :—

One of the objections on behalf of the prosecutor to the order of Quarter Sessions, is that it is invalid for want of jurisdiction because the notice, which is the groundwork of all the proceeding, was a nullity, not being signed by three persons as required by the Tithe Rentcharge Act, 1 & 2 Vict. c. 109. Section 32 of that Act provides that "any three or more persons in any parish, each charged with an annual payment of £3 or upwards in respect of the tithe rentcharge of the parish," may "make application" for the septennial variation of the rentcharge; "and the like notice of any such application shall be given and the like proceedings had thereupon" as provided by the Acts for establishing compositions for tithes. This refers us for this notice, which is the foundation of the application, to the 4 Geo. 4, c. 99, s. 43, by virtue of which the three or more persons (substituted by the 1 & 2 Vict. c. 109, s. 32, for the three or more owners or occupiers in 4 Geo. 4, c. 99, s. 43) may cause a notice in writing, signed by such three or more persons, to be published, as provided by the section, signifying that it is their intent to make application at Quarter Sessions for the variation of the tithe rentcharge of the parish. It is contended that—if such notice is signed by two persons only one of whom has in his own

(1) Noted in *Reg.* v. *Heaphy*, Crimes Act Cases, p. 603.

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right an estate of inheritance (or an equivalent estate as defined by the statute) in lands in the parish, separately applotted, in respect of which he is charged with the annual payment of £3 or upwards to the tithe rentcharge of the parish, and the other of whom (*a*) has in his own right a similar estate in lands in the parish, separately applotted, in respect of which he is charged with the annual payment of £3 or upwards to the tithe rentcharge, and (*b*) has a similar estate vested in him, as trustee for some other beneficial owner, in lands in the parish, separately applotted, for which he is charged with the annual payment of another and different sum of £3 or upwards to the tithe rencharge—a notice signed by such two persons is a notice signed by three persons within the meaning of the statute. By parity of reasoning a notice signed by one person would be a notice signed by three persons within the Act if such one person had different interests in three separately applotted parcels of land in the parish, *e. g.* as beneficial owner in fee of one; as trustee for another person of the legal fee in another, and as tenant by the curtesy of the other, being charged in respect of each with the annual payment of £3 to the tithe rentcharge of the parish. I think, however, that the 1 & 2 Vict. c. 109, s. 32, means what it says, and substitutes "three or more persons" (individuals) "in any parish, each charged with the annual payment of £3 or upwards in respect of the rentcharge of the parish," in place of the "three or more owners or occupiers of land in such parish, charged," under the 4 Geo. 4, c. 49, s. 43, "with the payment of the sum of £3 or upwards each in respect of the composition" under that Act; and therefore that the notice in the present case, being signed by two persons only, and not by three duly qualified persons, is a nullity (not merely an irregularity), and that the subsequent proceedings founded on that notice are invalid and of no force or effect.

Then it was contended in support of the order that this was a matter for the Quarter Sessions to determine, and that as that Court had decided that the notice was valid, the Queen's Bench Division cannot review the decision of the Quarter Sessions. This contention is answered by the decision in *Thompson* v. *Shiel* (1) and by many decisions, that want of jurisdiction in an inferior

(1) 3 Ir. Eq. R. 135.

Court may be shown by affidavit in the Queen's Bench Division when the order is removed by *certiorari*. Several of the authorities are collected in Paley on Convictions, 7th ed., pp. 354, 373.

Then it was argued that it is discretionary with this Court to grant or withhold the writ of *certiorari*; but I apprehend that in the present case the prosecutor, part of whose income is reduced by the order from £120 to £71 19*s.* 7*d.*, is entitled to the writ if this Court is of opinion that the order was made without jurisdiction.

I give no opinion on any of the other objections in the case.

For these reasons I think the order of the Quarter Sessions was made without jurisdiction, and that the conditional order for the writ of *certiorari* ought to be made absolute.

HOLMES, J.:—

Of the many points relied on by Mr. Ball in support of the conditional order, one is distinctly first in logical sequence.

He has argued that the jurisdiction of the Court of Quarter Sessions to make the order complained of depended upon three or more persons in the parish, each charged with the annual payment of £3 or upwards in respect of tithe rentcharge, having, previous to the application, signed and given the notice in writing prescribed by the 32nd section of 1 & 2 Vict. c. 109, taken in connexion with the 43rd section of Goulburn's Act, and that, as in the present case the notice was only signed by two persons, the proceedings before the Justices were without jurisdiction.

It is now well settled that a provision in a statute declaring that an order made thereunder shall not be removable into this Court by *certiorari*, does not apply where the impeached order is in excess of the statutory jurisdiction; and therefore the 57th section of Goulburn's Act, even if it is still in force, is no answer to this application, if Mr. Ball is able to sustain his first objection. The facts relating to this point are admitted. Only two persons signed the notice; but one of them, a gentleman called Waller, wrote his name twice, adding to one of the signatures the words "trustee for Charles P. Tisdall." Mr. Waller is the beneficial owner of lands in the parish charged with tithe rentcharge; and as such owner, and in respect thereof, he is liable to the payment

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of upwards of £3 a-year. Other lands in the parish, also charged with tithe rentcharge exceeding £3 a-year, are the subject of a settlement carried out by virtue of a power of appointment; and it appears from the instrument produced that, probably by some oversight on the part of the draftsman, the legal estate in fee-simple is thereby vested in two persons, the survivor of whom is Mr. Waller. He is in the strictest sense a bare trustee, having no actual trusts imposed upon him; and Charles P. Tisdall, a minor, is now the beneficial owner for life.

Assuming that Waller, having vested in him the legal estate, is, within the meaning of the 32nd section of 1 & 2 Vict. c. 109, charged with the tithe rentcharge payable out of these lands, does this circumstance constitute his second signature to this notice the signature of another person? I think that the mere statement of the proposition is enough to show its unsoundness. The 43rd section of Goulburn's Act requires the notice for the alteration of the amount of tithe composition to be given and signed by the person or persons entitled to the composition on the one hand, or by three or more owners or occupiers of land in the parish, charged with the payment of £3 or upwards thereof on the other. I can only interpret this language in one way. Three or more owners or occupiers of land must mean three or more individuals. A single person occupying three different parcels of land in a parish could never be held to be three or more occupiers of lands. Similar language is to be found elsewhere in the Act—in the 10th section, for example, where it is necessary to prescribe the number of persons required for certain proceedings. The Act 1 & 2 Vict., c. 109, substituted tithe rentcharge for the composition; and the 32nd section provides for its variation. In it, three or more persons, each charged with the annual payment of £3 or upwards in respect of tithe rentcharge take the place of the three or more owners or occupiers of the earlier statute; but the language used can only be satisfied by the co-operation of three or more distinct individuals or corporations.

For these reasons I am of opinion that the prescribed notice was not given. But it is argued by Mr. Campbell that this was a matter for the determination of the Justices, and now that they

have determined it, their decision cannot be reviewed in this Court. I cannot find anything in the statute to justify this contention. The giving the notice precedes and is independent of the proceedings at Quarter Sessions. When the provisions regarding the notice have been complied with, *thereupon* an application may be made, and the Court is given jurisdiction to entertain it. In such a case, it is the duty of this Court to inquire whether the conditions necessary to confer jurisdiction have been fulfilled. The distinction has often been drawn between matters which an inferior Court has jurisdiction to determine, and matters which must exist before jurisdiction can be exercised. I do not, however, consider it necessary to discuss this question at any length, inasmuch as the case of *Thompson* v. *Shiel* (1) is precisely in point, and shows clearly that an order reducing tithe rentcharge is null and void when the antecedent notice has not been given in the manner provided by the statute.

For this reason I hold that the writ of *certiorari* ought to go; and I offer no opinion upon the other points argued by Mr. Ball. Perhaps, however, I ought to add that I agree with Mr. Justice O'Brien in what he said as to the necessity of having the terms of the order declared at Quarter Sessions, and as to the illegality of making the additions after the sittings of the Court have terminated.

GIBSON, J.:—

The main question in this case is whether the application on the part of Mr. M'Cann and Mr. Waller, in his private capacity and as trustee for Tisdall, can be considered as the application of three persons. If it is not, the action of the Justices was plainly without jurisdiction, as an application by three is certainly a condition precedent to any variation of tithe rentcharge. What was the object of the Legislature? It was not merely to secure that no tithe rentcharge should be revised unless a substantial pecuniary interest was at stake. There would in that view have been no necessity for requiring that three persons should join in the application, and the supposed intention could have been carried

(1) 3 Ir. Eq. R. 135.

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out by phraseology such as is found in 6 & 7 Wm. 4, c. 71, s. 38, or the Irish Bankruptcy Act, 1872, s. 20. By making the concurrence of three persons a condition precedent to revision, it was obviously intended to give the owner of tithe rentcharge additional protection against variation, which might sometimes be attempted vexatiously. I am unable to agree with Mr. Campbell's contention that all that was intended was that three separate estates, each paying a rentcharge of £3, should be represented, and that one owner of three such estates could be regarded as split up into three persons. If the owner of one estate charged with a rentcharge of £9 could not apply, as he plainly could not, how can the accident that an owner may have three estates subject to separate rentcharges of the same aggregate amount make a difference?

It was next argued that Mr. Waller in his own right and as trustee was two persons in law. It is true that "person" in the statute includes artificial as well as natural persons. But even assuming that, as trustee of the legal estate, Mr. Waller might be legally liable (a point which was strenuously contested by Mr. Ball) he cannot be deemed a distinct person from himself in his own right. He is the same natural person, and as trustee he is not an artificial person, as if he were a corporation sole. If this be so, the application was by two persons and not three, and as the condition precedent to jurisdiction—*Thompson* v. *Shiel* (1)—did not exist, the Justices could not by an erroneous decision on the validity of the notice give themselves jurisdiction, and the order must fail on that ground.

A second point urged by Mr. Ball was that the order was not, as a matter of substance, made at Quarter Sessions. It appears that the arithmetical computation entrusted to the Clerk of the Peace was not made till after the Quarter Sessions: there was no adjournment of the Court, and there was no adoption of the figures and draft order (which was in a special form) by the magistrates sitting together as a Court. The calculation made by the officer was of no validity till adopted by the magistrates jointly as a Court. Suppose the officer had made a mistake in principle or arithmetic, how could it be corrected save by the Justices acting as

(1) 3 Ir. Eq. R. 135.

the Court of Quarter Sessions? The Court must make a complete order at Quarter Sessions, and for that purpose they must judicially determine the proper calculation, which they are bound to make and check themselves, though they may get assistance in doing so. By stating the date as of the 18th June, the defect of jurisdiction cannot be concealed or avoided, if in fact the order was not made till long after the Court was dissolved. No matter how correct the computation, in a case like the present where proprietary interests are involved, this Court could not I think, in the exercise of any discretion, refuse *certiorari* if the order was without jurisdiction.

I offer no opinion on any of the other questions raised.

Solicitors for applicant (O'Ferral): *Doherty & Moran.*
Solicitors for respondents: *Montgomery & Chaytor.*

A. E. R. J.

REG. (MARSHALL) *v.* JUSTICES OF CO. TYRONE (1).

Q. B. Div. 1895. June 28, 29.

Licensing law—Certificate for spirit grocer's license—Objection by police—Absence of, or withdrawal of, such objection—Beerhouses (Ireland) Act, 1864 (27 & 28 Vict. c. 35), ss. 3, 4, 5—Licensing (Ireland) Act, 1874 (37 & 38 Vict. c. 69), ss. 9, 14—Mandamus.

The plaintiff applied to Justices at Petty Sessions for a certificate for a spirit grocer's license. The police officer objected, on the ground of the unsuitability of the surroundings; and the Justices refused the application on this ground. The Court of Appeal having held that this ground was illegal, a writ of mandamus issued to the Justices to rehear and determine the said application, and the case was re-entered and came on for hearing before the Justices. The police officer withdrew the objection. The Justices, however, though the objection had been thus withdrawn, proceeded to examine witnesses, and made a return to the writ that they had duly reheard and determined the application, and had executed the writ by refusing the application on the ground of unsuitability of the premises:—

Held, by Gibson, J., at the trial of the issue joined on the pleadings in answer to this return, and by the Queen's Bench Division (Sir P. O'Brien, C.J.,

(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, J.

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and O'Brien, J.), that the order of the Justices and their return to the writ were bad, and that a peremptory writ of mandamus should issue to the Justices to grant the certificate.

Held, further, that the objection having been withdrawn on the adjourned hearing, without collusion or *mala fides*, and there being no objection before the Court, the duty of Justices, under 27 & 28 Vict. c. 35, s. 5, and 37 & 38 Vict. c. 69, s. 9, was merely to issue to the applicant the certificate to his good character and the suitability of the premises.

NEW TRIAL MOTION (Crown side) in mandamus.

The plaintiff, James Marshall, who had been on several occasions an applicant before the Justices of the Co. Tyrone (Strabane Petty Sessions District) for a certificate for a spirit grocer's license, obtained from the Court of Appeal, on appeal from the Queen's Bench Division, an order, dated the 24th June, 1894, for writs of *mandamus* and *certiorari*. The writ of *mandamus* issued in the following terms (1):—

"VICTORIA, &c., . . . to the Justices of Co. Tyrone, greeting. Whereas, by, &c.," reciting the Licensing Acts, 1872 and 1874, and the plaintiff's application on the 25th September, 1893, at Strabane Petty Sessions, for a certificate of his good character and of the suitability of his premises, to enable him to obtain a new spirit grocer's license for the sale of intoxicating liquors by retail, to be drunk or consumed off his premises at Ballyfatton—and reciting "that you our said Justices, . . . well knowing the premises, but not regarding your duty in that behalf, refused to grant said certificate on grounds not warranted by law, and then and there wholly neglected and refused to hear and determine the said application according to law, nor have you, nor any two or more of you, the Justices for said Petty Sessions District, at any time since the said 25th day of September, 1893, heard and determined the same, to the great damage and grievance of the said James Marshall, as we have been informed by his complaint made to us; whereupon we, being willing that due and speedy justice should be done in the premises as is reasonable, do command you our said Justices, that you, or any two or more of you, according to your authority in that behalf, do enter continuances upon and do rehear and determine according to law the application of the said James Marshall for the certificate aforesaid, or that you show us cause to the contrary thereof, lest, &c."

(1) See the report of these proceedings—[1895] 2 Ir. R. 174; and for the fortunes of the plaintiff's previous applications, see 32 L. R. Ir. 201; [1894] 2 Ir. R. 246, 277.

On the 5th November, 1894, the Justices made the following return to the writ:—

"The Justices assembled at Strabane Petty Sessions on the 5th November, 1894, having heard fresh evidence in this case, unanimously refuse the application of James Marshall on the ground of the unsuitability of the premises.—(Signed) T. W. D. HUMPHRIES, *Chairman;* JOHN BRITTON, ROBERT SMYTH, JOHN COCHRANE."

On the 6th December, 1894, an order was made by the Queen's Bench Division directing the defendants to amend their return within a week, on the ground that the foregoing return was insufficient.

In obedience to this order the defendant Justices made the following amended return:—

"The answer of the undersigned" (Justices) "to this writ: We, the undersigned, being four of the Justices to whom this writ is directed, do most humbly certify and return to our Sovereign Lady the Queen, at the time and place in this writ mentioned that we did, to wit, on the 5th day of November, 1894, enter continuances upon and did rehear and determine according to law the application of James Marshall for the certificate in this writ mentioned; and we most humbly make it known to our Sovereign Lady the Queen that we have executed this writ by unanimously refusing the application of the said James Marshall for said certificate, on the ground of the unsuitability of the premises in respect of which said certificate was sought, as by said writ we are commanded.—(Signed) T. W. D. HUMPHRIES, *Chairman;* JOHN BRITTON, ROBERT SMYTH, JOHN COCHRANE."

To this return the plaintiff pleaded in reply:—1. That the defendants did not hear or determine the matter of the application pursuant to the statute in such case made and provided. 2. That on the 22nd October, 1894, before the Justices sitting at the Strabane Petty Sessions, the application of the plaintiff for the certificate mentioned in the writ was called for hearing, in obedience to the said writ, and in presence of the District Inspector of Royal Irish Constabulary for the district of Strabane; that the plaintiff was a person entitled to apply for a certificate for a new spirit-grocer's license for his house at Ballyfatton, and duly made such application accordingly; that it became unlawful on such application for the defendants to refuse the said application unless valid objections were made by the said

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District Inspector to the issue of such certificate; and unless further the defendants had, after due adjudication upon such objections, been satisfied of the truth and sufficiency thereof; that the said District Inspector stated in open Court that he did not object to the granting of said certificate; and that thereupon the plaintiff was entitled, in the absence of any authorised objection, under 27 & 28 Vict. c. 35, sect. 5, or any objection, to obtain the said certificate; yet the defendants, well knowing the premises, unlawfully refused to grant the same. 3. That the defendants adjudicated on the said application of the plaintiff after hearing evidence called by themselves, or one of them, for the purpose of supporting objections raised by themselves, or one of them, to the granting of the said certificate.

The defendants rejoined, joining issue upon the reply, and, as a separate rejoinder thereto, pleading (par. 2) that on the 25th September, 1893, application was made by the said James Marshall to the Justices for the said certificate, and forthwith the said District Inspector objected to the issue thereof on the ground of the unsuitability of the applicant's premises; that the said Justices then received evidence as offered against and in support of the application thus made, and having considered it, refused to issue the said certificate; that afterwards, in obedience to the said writ, the defendants entered continuances and proceeded to rehear the said application, "and did rehear it by taking evidence concerning the validity of the objection so made as aforesaid, and having reheard such of the witnesses previously examined thereon as were present in Court, and having also taken additional evidence with reference to the said objection, the defendants were satisfied of the truth and sufficiency thereof, and came unanimously to the conclusion that the same was well founded, whereupon they determined the said application by refusing to issue the said certificate on the ground of unsuitability of said premises, as they were by law entitled to do."

The plaintiff in a surrejoinder joined issue, and as a further answer to the second paragraph of the rejoinder said, "that subsequent to the adjudication by the defendants on the application of the plaintiff on the 25th September, 1893, the said adjudication was quashed by virtue of a writ of *certiorari* passed forth of the

Queen's Bench Division, whereby the said application, and objection made on the hearing thereof, and all proceedings relating thereto, duly abated and determined." Issue was thereupon joined.

At the trial the prosecutor's surrejoinder was by leave amended by adding a plea to the effect that, on the 5th November, 1894, when the defendants entered continuances upon and proceeded to rehear the said application, no objection being then made by or on behalf of the constabulary, it became unlawful for the defendants to refuse the said certificate, and a further plea that the objection was formally withdrawn by the District Inspector, and that no evidence in support of same was entered or given by him or on his behalf.

The case was tried before Mr. Justice Gibson on the 26th February, 1895, without a jury.

The following statement is in substance taken from his notes. The plaintiff's original application for a certificate necessary to enable him to take out a spirit-grocer's license, made at the Annual General Licensing Sessions, Strabane, on the 25th September, 1893, and the order of the Justices refusing same, on the ground of "the unsuitability of the premises from their locality being in the immediate neighbourhood of another public-house, and also close to a school and place of worship," and the order of Quarter Sessions, affirming same on the ground of "unsuitability of premises" (which orders were the subject of the proceedings (1) for *certiorari and mandamus* in the Queen's Bench Division and in the Court of Appeal) were put in evidence, as was also the order of the Court of Appeal of the 27th June, 1894, and the writ of *mandamus* set out above, and also the writ of *certiorari* of same date (2).

Consequent upon the issue of the writ of *mandamus*, Mr. Risk, Marshall's solicitor, on the 4th October, 1894, served notice on the police of re-entering the application. On the 22nd October, the Justices sat to hear the case, but were equally divided in opinion, and "no rule" was made. No evidence was given at the

(1) Reported [1894] 2 Ir. R. 246; [1895] 2 Ir. R. 174.

(2) In obedience to the writ of *certiorari* the Justices had returned their order of refusal into the Queen's Bench Division, but no steps had been taken to have same formally quashed.

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trial of what took place at this hearing, but counsel stated (though this was not admitted by the defendants) that District Inspector Dunlop (on the part of the police) declined to object. Mr. Humphries, one of the presiding Justices, said that they would call witnesses, and examined Sergeant M'Cloy. The case was re-entered for the 5th November, when Mr. Humphries, J.P., was in the chair. The applicant's solicitor handed in a protest (entered). As was shown by an extract from the Petty Sessions Book (entered by consent) the police did not object. The police sergeant was examined as before. Marshall and his witness (Maguire) were not cross-examined.

On the original application in September, 1893, the then District Inspector of Police, Tyacke, had formally objected on the ground of "unsuitability of the premises," meaning thereby, not structural unsuitability, but "the circumstances of the surroundings, and the fact that the applicant carried on a general grocery business in said house" (1).

For the plaintiff, *Campbell, Q.C.* referred to 27 & 28 Vict. c. 35, and the provisions as to appeals in 18 & 19 Vict. c. 62, as showing that a *legitimus contradictor* was necessary; and cited *Reg.* v. *Howard* (2).

For the defendants, *D. B. Sullivan, Q.C.*, argued (*a*) that on the pleadings the defendants were entitled to a direction, and that the original order was never finally quashed; (*b*) that the original objection made in 1893 by District Inspector Tyacke was still alive, *Reg.* v. *Gorman* (3); that the objector never withdrew it, and that the police had no power to retract it, referring (as to the Justices examining witnesses) to *Reg.* v. *Hawkins* (4); (*c*) that even if there was no objection, the Justices had a discretion which they could not be compelled to exercise by *mandamus*: *Reg.* (*Molloy*) v. *Justices of Co. Dublin* (5); *Reg.* v. *Justices of King's Co.* (6). *Ross, Q.C.*, referred to 23 & 24 Vict. c. 25, sect. 2.

Campbell, Q.C., in reply, (*a*) asked leave to amend by alleging that the objection of September, 1893, was cancelled and extin-

(1) See report, [1894] 2 Ir. R. page [269.
(2) 23 Q. B. Div. 502.
(3) [1894] A. C. 23.
(4) 2 New Rep. 62.
(5) 10 Ir. C. L. R. 80.
(6) 3 Ir. Jur. (N. S.) 294.

guished by the order of the Court of Appeal, and that the objection was withdrawn by the police on the 5th November, 1894. The learned Judge gave leave so to amend, and to make any amendments in accordance with the facts proved (*Sullivan, Q.C.*, objecting). Counsel further relied (*b*) on *Reg.* v. *Howard* (1), as showing that the original objection was gone when the *mandamus* issued, notwithstanding that the order of the Justices was not formally quashed; and (*c*) contended that the Justices had no discretion where there was no objection before them.

The learned Judge, in his note, then stated: "Without deciding that (as Mr. Campbell argued) the original objection of District Inspector Tyacke was cancelled by the order of the Court of Appeal (which appeared to me as a matter of great doubt), I thought that it was afterwards withdrawn by the police, and that there was no objection before the Justices. The original objection was held by the Court of Appeal to be illegal. I did not think that the objection was a pleading which it required leave to withdraw, though it might be otherwise if evidence had been given, and collusion were attempted. As to the question of discretion, I was inclined to think that if there was no objector or objection, the Justices had no discretion. With some doubt, and in deference to the judgment of the Court of Appeal, I gave judgment for the plaintiff, awarding a *mandamus*, with costs, staying execution and extending time for moving."

Counsel for the defendants now moved to set aside the judgment so entered, and to have judgment entered for the defendants, on the ground that said judgment was erroneous in point of law.

D. B. Sullivan, Q.C. (*Ross, Q.C.*, and *J. H. Gallagher*, with him), for the defendants.

Campbell, Q.C., and *W. H. Brown*, for the plaintiff.

Ross, Q.C., in reply.

[The arguments of counsel were the same as those used at the trial. In addition to the cases mentioned above, reference was also made, during the argument, to the following: *Reg.* v. *Justices*

(1) 23 Q. B. Div. 502.

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of Merthyr Tydvill (1); *Reg.* v. *Farquhar* (2); *Reg.* v. *King* (3); *Reg.* v. *Adamson* (4); *Reg.* v. *Co. Clare Grand Jury* (5); *Reg.* v. *Sullivan* (6); *Reg.* (*Blakeney*) v. *Justices of Roscommon* (7); *Reg.* v. *Justices of Co. Antrim* (8).]

The judgment of the Court was delivered by—

June 29.

O'BRIEN, J.:—

I must say that I have from an early stage of the case entertained no doubt at all about the matter. The case was tried before Mr. Justice Gibson upon proceedings by way of *mandamus* arising upon an order made by the Court of Appeal commanding the Justices of a certain Petty Sessions district to rehear and determine the matter of an application which had been already under their consideration. The matter has already given rise to a great deal of discussion in this Court and in the Court of Appeal, and may, perhaps, give rise to more in other places. The Justices had refused to grant the necessary certificate upon a ground which, after much controversy, has been adjudged to be unlawful, namely, the undesirableness of granting the certificate, not upon either of the grounds referred to in the statute, but upon a ground entirely different—substantially in the interests of public morality—from the real foundation of which in fact I have no desire to dissent.

The decision of the Justices having been questioned was supported in this Court; but, on appeal, it was held that the decision of the majority of the Judges was not correct; the order of this Court was reversed, and an order made by the Court of Appeal, under the powers conferred by the Judicature Act, directing the Justices "to rehear and determine" the application. The extent of the jurisdiction conferred by that order on the Justices is not substantially different from the similar authority which has been found to exist in England under statutes using the same words. The duty of the Judge on appeal under the Civil Bill Acts in this country is to "hear and determine," and it has always been con-

(1) 14 Q. B. Div. 584.
(2) L. R. 9 Q. B. 258.
(3) 20 Q. B. Div. 430.
(4) 1 Q. B. Div. 201.
(5) [1894] 2 Ir. R. 691.
(6) Noted in *Reg.* v. *Heaphy*, Crimes Act Cases, p. 130.
(7) [1894] 2 Ir. R. 158.
(8) Since reported, [1895] 2 Ir. R. 603.

strued to extend to hearing all such matters as properly arise and are necessary to an adjudication in the case; and, when any qualification of this rule was admitted, it was made by statute, or by express rule framed by the County Court Judges under the authority of statute. Whenever an order of *mandamus* issues from this Court it has never been doubted that the magistrates have full and plenary powers to hear and determine the whole matter. And no answer has been given to the objection—which arises from the necessity of the case, and which was pressed so strongly on counsel by the Lord Chief Justice—that Justices are a transitory and fluctuating tribunal, and that individual Justices cannot be expected to carry in their minds the record of previous proceedings. A memorandum only remains upon the book to show that the objection was taken. What is the form of objection under the Act of 1861? The officer of constabulary stands up and says, "I object." The ground need not be stated in writing. It depends on his own personal action, and if not repeated the whole objection necessarily falls to the ground. It would appear to me to be a species of technicality which would give rise to terms of opprobrium to suggest that a constable might attend on one occasion at the Petty Sessions Court, or at Licensing Sessions, and, upon an application being made, might say, "I object"; and that, on another occasion, although the case was brought on before a differently constituted tribunal, this objection should stand irrevocable. Certainly it is an effect of the "*irrevocabile verbum*" which is not to be found in any other branch of our law. Who is the person to whom this power is conferred by the law? He is not a private person in the locality; he is not a litigant; he is acting under public authority according to instructions given to him by his superior officer, which may be varied from day to day. To-day he may be ordered to object; to-morrow he may be ordered not to object; he is bound to obey. Can it be supposed that it was the meaning of the Act of Parliament, or that anyone construing these sections would take them to mean, that, where an officer of the law had stood up at one occasion and objected to the certificate, he must still, after the interval of twelve months, or when the next sessions came round, remain bound by his former statement, and that the Justices are bound to act on it although the

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jurisdiction which arises under the Act of Parliament is, in terms, only to adjudicate on the validity of an objection, and although the same magistrates may not be present, and the *personel* of the tribunal entirely changed! I do not find a single passage in any of the cases cited which bears any such construction. As the very foundation for the permission given to the party to serve a new objection—in the qualification contained in one of the judgments cited—it was assumed that the former objection was gone; and it is the necessity of the case, and quite in accordance with the construction put upon other similar provisions of the statutes, that, when once the Court of Appeal pronounced its decision, the objection and everything connected with it fell to the ground, and that it was only the order of the Court of Appeal that preserved the application itself; and, even then, it was necessary for the purpose of renewing the application to serve notice upon the parties of re-entering the matter for hearing.

I certainly do not wish to express any opinion upon the question whether it would be proper on the part of a competent tribunal, having once acquired the right to hear a case, to yield to every change of mind or intention on the part of a person whose assent to the proceedings was originally required. It is a jurisdiction which is very constantly practically exercised in reference to private complaints; and I would not say that Justices would not still, in spite of the change of mind of such person, have power to force him to proceed with the case, in the interests of and for the preservation of the public peace and in the exercise of public authority. But that is a different case from the present altogether. The very person, whose assent, according to the view which I take of the case—in which I understand that I have the concurrence of the Lord Chief Justice—was required to invest the Justices with jurisdiction, here stands by in open Court, and says, I withdraw my objection. That might have occurred during the original hearing, and then we should have a different matter to decide from the one now before us.

This case must be determined on its facts. The application came on, in obedience to the order of the Court of Appeal, to be reheard and determined on the 22nd October; and—though counsel insisted, as they were quite right in insisting, in the

interests of their clients, on every legal objection—I entertain no kind of doubt whatever but that the objection was withdrawn on the occasion of the first rehearing, that is on the 22nd October. I draw that conclusion from the evidence, but I treat that matter as completely immaterial. Whether withdrawn then or not, there was no ruling made on that occasion, and the case stood adjourned until the 5th November. For all we know—and I believe the fact is so—the Bench was constituted differently on the two occasions. However, on the 5th November, before the hearing was entered on in any way, the officer entrusted with this duty under the statute stated in open Court that he withdrew the objection—that is, the Court of Appeal having declared the objection to be illegal, he considered it therefore his duty not to proceed with it any further.

Now, upon the terms of the statute, I have no doubt what is the true construction of section 5 of the Act of 1864. One observation, certainly, always occurs to everybody who has to consider this licensing code—that this legislation has taken place under a continuing struggle and conflict between the interests of the revenue and the interests of the law. The very earliest statute upon this licensing question empowered the magistrates to act without any evidence whatever. They were entitled to act upon their own personal knowledge and judgment. Under 3 & 4 Wm. 4, cap. 68, they could act upon any evidence whatever, out of Court, and upon their own judgment; and it is most manifest that, in order to maintain the interests of the revenue, whose rights were seriously impaired by the exercise of this kind of personal authority, restrictions have over and over again been placed upon its exercise.

Look at section 5 of the Act 27 & 28 Vict. c. 35. It says:—

"The sub-inspector of the district, or in his absence the head constable, or, if in the Dublin metropolitan police district, the superintendent of police of the division, shall be and he is hereby authorised to object before the justices at petty sessions, or the divisional justices, as the case may be"—

To what?

—"to object . . . to the issue of such certificate; and the justices shall in such case proceed to consider, examine on oath into, and adjudicate upon the truth,

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sufficiency, and validity of such objection; and if such justices shall be satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate."

The whole jurisdiction of magistrates is now substantially governed by statute; they act and move entirely under Act of Parliament; and hardly any branch of their jurisdiction remains which is not limited by express enactment.

Section 3 of the same Act provides that the Excise officers are not to grant licenses or renewals of licenses unless the proper certificate is produced:—

"... without such person producing a certificate, signed by two or more justices of the peace presiding at the petty sessions of the district in which such person resides, or if in the Dublin metropolitan police district by a divisional justice of the district in which such person resides, to the good character of such person and the suitability of the premises for the purpose of such sale; and, where the application shall be for the transfer of an existing license, or the renewal of a license for the same house as shall have been licensed in the year last immediately preceding, and which license shall not have been withdrawn or annulled, without a similar certificate to the good character of the person applying for such renewal, or of the person to whom such transfer is proposed to be made, and to the peaceable and orderly manner in which such house has been conducted in the past year."

This is the certificate for which the applicant goes to the licensing sessions. The granting of this certificate has often been stated to be a judicial act. In some respects it is a judicial act on the part of the Justices; in other respects it is not so at all. It is not a decree or order that they make; what they give is a certificate, authenticated and signed under an authority that removes it from the character of a judgment or a judicial proceeding; and it is to this that the police officer is authorised to object. As to the magistrates, their duty is directed, under the concluding words of the 5th section, to cases where such objection is made; if "such objection" is made, they have the right to examine into its truth and sufficiency; but apparently, unless an objection is made, they have no right to examine into the question at all. In other words they have an affirmative authority given to them in one case only—where such objection is properly brought before

them—and their duty is circumscribed and limited to the exercise of the authority so given.

Mr. Campbell referred in his argument to the overwhelming weight which must be given to section 14 of the Act of 1874, which, in the case of applications for renewals of ordinary licenses, directly forbids the magistrates to entertain any objection, of which notice has not been given beforehand :—

"The justices shall not entertain any objection to the signing of such certificate, or receive any evidence with respect to same, unless a written notice of intention to oppose be served on the applicant not later than seven days before the holding of such session, stating in general terms the grounds on which the renewal of such license is to be opposed."

The presence of the officer of constabulary, under section 5 of the Act of 1864, is substituted or replaced by the written notice under the Act of 1874, and both, apparently, involve the same limitation on the power of the Justices. And there is a further provision in the same section of the Act of 1874 which makes the matter more clear, for, to prevent the possibility of any mischief arising or prejudice to the interests of justice from the necessary notice, through any inadvertence, not being served within the time so fixed, the section goes on to provide that, though no notice has been served, the objection may be made in Court—that is, on the very occasion of the application for the renewal being made. But what happens then? There can be then no adjudication; it is not assumed that the Justices could on that occasion enter into the matter. No; they must "adjourn the signing of the certificate to a future day." That is to enable the party objecting to make, formally and on notice, the objection which he has already made then and there. All these statutes deal with the same subject-matter, and follow out the same policy, and they must obey the general rule and be construed together.

What was done in this case? The objection was withdrawn; and, notwithstanding this, the magistrates proceeded to hear and adjudicate upon that objection, as if it was still before them. This was no adjudication, for the whole foundation of their authority depended on the existence of the objection. They make a return to the *mandamus* that they have heard and determined

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O'Brien, J.

the case, and have refused the application on the ground of the "unsuitability of the premises." It does not matter what ground they set out; but they state it generally, understanding, no doubt, that the more general their statement of the ground, the more entirely free would they be from all possibility of question thereafter.

The question then remains as to the mode of dealing with them. But the law is quite settled that where Justices make an order in a case in which they had no authority to begin the inquiry at all, their order is a mere nullity. This is settled by the English decisions. The return, therefore, which they have made to the writ of *mandamus* is bad, and the matter becomes one for a direction of the Judge, if the case be tried before a Judge and jury, or for the consideration of the Judge exercising his own judgment, if the case be tried before a Judge alone, as was the case here. Mr. Justice Gibson decided, accordingly—and his decision has my entire concurrence—that the case must be treated as if there was no return whatever, and that a writ of *mandamus* must therefore issue.

I fully agree in the course which he has taken; I see no possible answer to it; and I must say that this Court would expose itself to an extreme and unusual degree of observation if it were to reverse the judgment of the learned Judge who tried the case, upon such—I will not call it a technical, but on such a futile ground as that advanced by the defendants—that this application came before them as a properly constituted tribunal, and that, though at the rehearing there was no objection before them, still they were right in hearing and deciding upon it. And I must say further that, whatever view I may entertain of the reasons which apparently have induced this body of magistrates to avail themselves of every technical ground, as they are legally entitled to do, in order to give effect to their views of general morality, they do not, however, carry me with them to the length of sanctioning what is, and what I must declare to be, technically and in substance, resistance to the law by a tribunal constituted to carry the law into effect.

Solicitor for the plaintiff: *T. H. Risk.*

Solicitor for the defendants: *P. Gallagher.*

A. E. R. J.

BREW AND GLYNN, TENANTS; STACKPOOLE, LANDLORD (1).

Appeal.
1895.
June 11, 14.

Landlord and tenant—Landlord and Tenant (Ireland) Act, 1870—Compensation for improvements—Advances to tenants by Commissioners of Public Works—Claim by Commissioners against amount awarded as compensation to the tenant.

A tenant from year to year of lands applied for and obtained from the Commissioners of Public Works, under section 31 of the Land Law (Ireland) Act, 1881, a loan of £375, to be expended in drainage and erecting farm offices, and executed a deed whereby he charged all his tenancy, estate, and interest in the lands with the payment to the Commissioners of the advances and interest. The tenant's interest was sold under a writ of *fi. fa.* to Brew and Glynn, who subsequently surrendered the tenancy to the landlord, and served a claim for compensation for improvements for £498 3*s.* 4*d.* The County Court Judge disallowed the claim. The claimants appealed to the Land Commission. The Commissioners of Public Works obtained leave to intervene, and, on the hearing of the appeal claimed to be mortgagees of the compensation moneys. The Land Commission awarded the claimants £237 10*s.* compensation for improvements, but held that the claim of the Commissioners of Public Works to have a charge upon the amount so awarded was unsustainable:—

Held, by the Court of Appeal (reversing the Land Commission) that the Commissioners of Public Works were entitled under their charge to the amount so awarded as compensation for improvements.

APPEAL by way of case stated from the decision of the Irish Land Commission holding that the Commissioners of Public Works were not entitled to claim under a deed of charge on a tenant's holding given as security for a loan, the amount of compensation for improvements awarded to the tenant by the Irish Land Commission.

The decision of the Land Commission is already reported [1894] 2 I. R. 193, where the facts are set out.

The Solicitor-General (*Hemphill, Q.C.*) and *Vesey Fitzgerald* for the intervenients (the Commissioners of Public Works).

D. B. Sullivan, Q.C., and *W. F. Kenny* for the claimants.

(1) Before WALKER, C., and FITZ GIBBON and BARRY, L.JJ.

Appeal. 1895.

BREW AND GLYNN, *Tenants:* STACKPOOLE, *Landlord.*

The arguments were the same as those already reported in the Court below; but counsel for the intervenients stated that in the Court of the Land Commission a distinction had been drawn by them between the landlord's estate and the tenants' estate in the landlord's hands, which that Court did not seem to have caught.

Cur. adv. vult.

June 14.

WALKER, C.:—

In 1883 Richard O'Donnell was tenant from year to year to Mr. Stackpoole of the lands of Cloomore, containing 112 statute acres, at the yearly rent of £120. He had made improvements on his holding, and contemplated making more. With this object in view, he applied to the Commissioners of the Board of Works for an advance, under section 31 of the Land Law (Ireland) Act, 1881, of £375, and the Commissioners agreed to make the loan, upon security being given. Accordingly, by deed dated the 31st May, 1883, in consideration of the said advance, O'Donnell charged his holding and all his estate and interest therein with the repayment to the Commissioners of all advances from time to time made to him by them, with interest on such advances, at the rate of £3 10*s.* per cent. per annum. This deed contained a proviso that if for twenty-two years an annuity of £6 10*s.* in respect of every £100 advanced were paid, the loan would not be called in, and that if O'Donnell discharged the loan by the regular payment of this annuity, the Commissioners would release the lands. The deed contained a further proviso that if default in payment of the said annuity was made for six months, all advances due should forthwith become payable as a present debt. Then followed covenants by O'Donnell to pay the said annuity by half-yearly payments, to expend the sums advanced in making the proposed improvements, and to maintain the said improvements when made. O'Donnell also covenanted that he would pay the rent and observe all the conditions of his tenancy, and not do anything whereby the tenancy would become liable to be determined. The deed also incorporated the powers of sale given by the Conveyancing Act, with some modifications.

The Board of Works advanced to O'Donnell the sum of £300 on foot of the said loan, which was duly expended in the execution of drainage and other works on the said holding.

In the year 1885 the interest of O'Donnell in the holding was sold by the sheriff under a *fi. fa.* to the respondents Brew and Glynn, for the sum of £126, and was duly assigned to them by deed dated the 18th July, 1885. O'Donnell retained possession of the holding for some years, and the respondents were forced to take ejectment proceedings against him. In these proceedings they obtained judgment for possession of the said holding, and the writ for possession thereof was executed, and possession thereunder delivered to the respondents on the 1st November, 1888.

Shortly after they had thus obtained possession, Brew and Glynn, without the knowledge of the Commissioners of the Board of Works, surrendered the tenancy to the landlord, and on the 27th November, 1888, they served a claim for compensation for improvements under the Land Act of 1870, claiming in the whole £498 3*s.* 4*d.* This claim was heard by the County Court Judge of Clare, who on the 31st October, 1890, dismissed the same with costs, and from this dismiss the claimants appealed to the Irish Land Commission.

Meantime the annuity by which the said loan was repayable had fallen largely into arrear, and on the 10th October, 1893, the total sum required to redeem the said loan was £371 18*s.* 1*d.*

By an order of the Land Commission, dated the 23rd July, 1892, the Board of Works got liberty to intervene at the hearing of the said appeal.

The appeal was heard on the 21st of November, and 5th December, 1893, and judgment therein was delivered on the 26th January, 1894, declaring that the claim was established to the extent of £237 10*s.*, viz. £79 10*s.* for works executed prior to the loan, and £168 for works executed with the proceeds of the loan from the Board of Works, and further declaring that the Commissioners of the Board of Works had no charge, nor any right to claim this money or any part of it, and accordingly ordering that the money should be paid by the landlord to Brew and Glynn.

From that decision this appeal has been taken on a case stated by the Land Commission, by which two questions have been submitted for our consideration—1, whether the Commissioners are entitled to be paid the money awarded in respect of the improvements made before the loan; and 2, whether the Commissioners are

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Walker, C.

entitled to be paid the money, awarded in respect of the improvements made after the loan.

Improvements of the class we are considering when made upon a holding become part of the land. At Common Law they became for ever part of the inheritance, and though the tenant had during his tenancy a qualified interest in them, whenever his estate ceased by surrender, determination, or eviction, they became the property of the landlord as part of the land. If the tenant gave a legal mortgage on his estate or interest or an equitable security in the form given here, the charge attached during the tenancy on the improvements as part of the thing charged but ceased with the tenancy. If there were a graft on the tenancy the charge equally attached in equity to the extended interest.

The Common Law worked such hardship that it was considered just that the landlord should not appropriate what had been put upon the soil by the tenant's industry and capital, and accordingly the Act of 1870 was passed. The 3rd and 4th sections of this Act conferred a sort of tenant right, giving the tenant compensation if he was disturbed in his holding by the act of the landlord, and also compensation on quitting his holding for all improvements made thereon by him or his predecessors in title. The right to this compensation for improvements passes with the title to the tenancy. It is given for the value of the works carried out on the lands, subject to certain prescribed reductions.

Thus the landlord while retaining the improved subject, gives back to the tenant the money which represents the improvements, and there is a division between the landlord and the tenant of the thing upon which the security of the equitable incumbrancer attached.

In this case if the determination of the tenancy was effected by a surrender *inter partes*, it is plain that the incumbrancer could follow the land, but if the landlord pays the compensation to the tenant and also the charge to the incumbrancer he will have paid more than once, and the tenant will have carried off free from the charge the representative of the improvements.

It is said the claim of the tenant against the landlord is only a personal one carried out by the payment of money: but it springs out of the tenant's ownership of the land and projects it back, as

representing the land, and it is secured in two ways—1, by a personal liability; and 2, by a right to retain the subject till payment is made, *i.e.*, the highest form of lien. The tenant has not insisted upon that right, but this does not alter the character of the claim.

The case of the *Attorney-General* v. *Ireland* (1) does not help the argument, inasmuch as no decision was come to upon the point we are considering. The case of *Ex parte Lambton* (2) is of importance, because it establishes that the mortgage catches everything payable to the mortgagor for compensation in respect of the property. Here, Brew and Glynn claimed this compensation, because they had owned the land and added to its value.

The mortgage attaches on all the improvements made, and to be made, on the lands. If the tenant builds a house, it is part of the mortgagee's security, and it seems strange that he should be able to claim by reason of his property in the house, the money value of it, as an improvement, and hold what represents the house discharged of the mortgage. The anomaly and injustice are only made more obvious by its being shown that most of the improvements were actually made with the loan from the Board of Works.

I am of opinion that the mortgage attaches in equity on all the improvement moneys awarded, and that both the questions submitted to us should be answered in the affirmative.

FITZ GIBBON, L. J.:—

The second question relates to the money that is still due to the Board of Works upon the loan which supplied the means for effecting the very same improvements for which the compensation was awarded. There is no escape from the difficulty put by the Solicitor-General, that if the Board of Works could have retained or enforced any claim against the landlord after he took the place by the surrender, and if the answer of the Land Commission to the second question is right, the landlord must have been liable to pay twice for the same thing. He must pay the tenants the value of improvements for which they

(1) 15 L. R. Ir. 145. (2) 3 Ch. Div. 36.

Appeal. 1895.

BREW AND GLYNN, *Tenants*; STACKPOOLE, *Landlord.*

Fitz Gibbon, L.J.

had not paid anything, and he must also pay the cost of the same improvements to the Board which lent the money spent upon them.

Surrender is an assignment of the surrendered interest, and, *prima facie*, the surrendered interest, in my opinion, must be treated as remaining liable to any charges created by the assignor upon that surrendered interest. This is wholly different from the case of *The Attorney-General* v. *Ireland* (1), where there was an eviction by title paramount, and the landlord took by virtue of his own superior ownership, and not by assignment from or through the tenant. The surrendering tenant's interest cannot be increased, or relieved, by the release or disclaimer, by the Board, of any claim against the landlord. The money representing the expenditure upon the improvements must go to those whose money was lent in order to make the expenditure, and until that loan is paid, the tenants cannot take the money. So much for the second question, if it stood alone.

General principles seem to me to show that the previous expenditure of the tenant only increased the subject-matter of the security for the advance, and must follow the same rule. The amount involved in the first question is smaller than that dealt with in the second, but the principle is important. The statute which enables the Board of Works to make an advance to a tenant applying for a loan speaks expressly of their satisfying themselves of "the sufficiency of the security." They were bound to see what the holding was worth before they made the advance, and undoubtedly the entire interest of the tenant, including the improvements due to his previous expenditure, formed that security.

As to the claim being a personal claim, I cannot follow the argument. The compensation is payable for *works*: the possession of the holding, with those works upon it, can not be taken up from the tenant until the compensation is paid or secured. In the view of equity the sum due to the Board of Works is in the nature of unpaid purchase-money of the works which form part of the tenant's interest in the holding. So long as the holding remained in the tenant's hands, the security of the Board of

(1) 11 L. R. Ir. 145.

Works attached directly to the improved holding; and when the tenant's claim was turned into money, I think the Board had, at the least, an option to claim the money. I express no opinion as to whether they had also, or in the alternative, a claim to go against the surrendered property in the landlord's hands, or against the landlord. If they had such a claim, the amount of it must have been excluded from the compensation payable to the tenant. The questions as to this were expressly reserved in Ireland's Case, because the tenant was not before the Court, and the Board of Works had not intervened in the proceedings to fix the compensation.

BARRY, L.J., concurred.

Solicitor for the Commissioners of Public Works: *P. Coll.*
Solicitor for the tenants: *Thomas Kelly.*

G. Y. D.

ROCHE *v.* MEYLER (1).

(1895. No. 3894.)

Practice—Particulars—Slander of title—R. S. C., Order XIX., Rule 7.

A statement of claim alleged that the defendant had slandered the plaintiff's title to certain lands by publishing certain words "just before the exposure to sale by auction of said lands," "whereby the persons desirous of purchasing were prevented from bidding," to the plaintiff's loss, &c. :—

Held, that the defendant was entitled to an order that the plaintiff should furnish particulars of the occasions when and where such words were spoken, and also of the persons present on such occasions, and the best particulars she could give of the persons who were desirous of purchasing, and were prevented by reason of the words complained of.

MOTION for particulars in action for slander of title.

The statement of claim averred that the plaintiff was possessed of and entitled to, and had a full disposing power over, the

(1) Before O'BRIEN, JOHNSON, HOLMES, and GIBSON, JJ.

Q. B. Div. 1895.

ROCHE v. MEYLER.

tenant's interest in a certain farm of land in the county of Wexford, and that the defendant well knowing this, maliciously, "just before and upon the exposure to sale of the said interest of the plaintiff," published certain words (set out) alleging, in effect, that the plaintiff could not sell said farm without the defendant's consent, which consent would not be given, "by means whereof persons desirous of purchasing were prevented from bidding," to the plaintiff's great loss and damage. The amount claimed was £500.

Falconer, for the defendant, now moved for particulars of "the persons to whom, and when, and where, the words complained of in the statement of claim were spoken"; particulars of the damage claimed; and particulars of the names of the persons who were alleged to have been desirous of purchasing at the sale and who were alleged to have been prevented from bidding thereat by the defendant's alleged words."

[O'BRIEN, J.: How can the plaintiff know what was in the minds of persons at the auction? Might he not, at the trial, merely prove that there was a crowd of people there?]

[JOHNSON, J.: The order made in the case of *Williams* v. *Ramsdale* (1) was for "the best particulars that the plaintiff could furnish." If the plaintiff here does not know the names of the persons who were prevented from purchasing, he will not be prejudiced.]

Such a qualification would I submit in this case render the order futile.

[HOLMES, J.: If we were to order more, we might make it impossible for the plaintiff to proceed to trial without contempt of Court.]

The defendant was not represented on the motion.

THE COURT made the following order, refusing particulars of the damage alleged:—

"ON motion, &c., it is ordered that the plaintiff do, within ten days from the service of this order, give particulars of the occasions

(1) 36 W. R. 125.

when and where the words complained of in the statement of claim were spoken, and also particulars of the persons present on such occasions, and the best particulars she can give of the persons who were desirous of purchasing and were prevented by reason of the words complained of, and that the defendant's costs of this motion, measured at £4 4*s*., be costs in the action."

Solicitors for the defendant: *P. J. O'Flaherty & Son.*

A. E. R. J.

CURNEEN, TENANT; TOTTENHAM, LANDLORD (1).

Land Com. 1895. Oct. 29.

Landlord and tenant—Notice by tenant of intention to sell tenancy—Election by landlord to purchase—True value—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 1 (3).

The true value of a tenancy within the meaning of section 1, sub-section 3, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), is not to be measured by the value of the improvements on the holding made by the tenant or his predecessors in title for which he has not been paid or compensated by the landlord; nor is such true value the highest competitive value of the tenancy, but bears much the same relation to it that a fair rent bears to a competitive rent.

THIS case, which was heard at Enniskillen on the 24th October, 1895, now appeared in the list for judgment (2). The facts and question for decision are stated in the judgment of Bewley, J.

BEWLEY, J.:—

The holding in this case contains 22 statute acres, and is held under a tenancy from year to year at a judicial rent of £4 15*s*. which appears to have been fixed in the year 1884. The tenant having served notice on the landlord of his intention to sell the tenancy, the landlord, as he was entitled to do, claimed to exercise the right of pre-emption given to him by the 1st section of the

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

(2) At the hearing in Enniskillen Mr. Stubbs, solicitor, appeared for the landlord. There was no appearance for the tenant.

Land Com. 1895.

CURNEEN, *Tenant*; TOTTENHAM, *Landlord*.

Bewley, J.

Land Act of 1881, and having disagreed with the tenant as to the price, served an originating notice to have the true value of the tenancy ascertained by the Land Commission. The case came on for hearing before a Sub-Commission, who after hearing the evidence of the landlord and of Peter Curneen, and inspecting the holding, fixed the true value at the sum of £30. The landlord, considering this sum excessive, served a notice of rehearing before this Court, and, according to our usual practice, prior to the rehearing, we had the holding inspected by two experienced Court valuers—Mr. Bomford and Mr. Macafee—who reported, amongst other things, that the true value was, in their opinion, the sum of £30. When the case came on for rehearing there was no appearance for the tenant, who, it was stated, had gone to America, and the only witness examined was the landlord. There was no evidence that there were any improvements on the holding made by the tenant or his predecessors in title, and it was strenuously urged by the landlord that the true value of the tenancy, within the meaning of the 1st section of the Land Act of 1881, was to be measured by the value of the tenant's improvements, for which the tenant had not been paid or compensated by the landlord; and that as no such improvements were shown to exist in the present case, the true value should be fixed at a nominal sum. But it is to be borne in mind that what the tenant is selling and the landlord is buying is not merely the tenant's interest in any improvements on the holding, but the tenancy itself, with all such rights as are given to the tenant of a present tenancy by the Acts of 1870 and 1881.

As I have had occasion to observe more than once, the true value of the tenancy, within the meaning of the 1st section of the Land Act of 1881, does not appear to be the highest competitive value. In the 4th section of the Act of 1881, sub-section 2, the expression "selling value" of a tenancy occurs in two places, and the Arrears of Rent Act, 1882—an Act in *pari materia* with the Land Act of 1881—in section 1, sub-section 2, deals with the "saleable value" of a tenancy. The true value, therefore, appears to be something different from the "selling value" or "saleable value," and would seem to bear much the same relation to the full competitive value as a fair rent to a competitive rent. Some obser-

vations of the late Mr. Justice O'Hagan, on the hearing of an application in certain cases on the Marquis of Headfort's estate reported in Macdevitt's Land Cases, page 328, were supposed to give countenance to the idea that he was of opinion that true value and specified value were almost equivalent to the compensation for improvements a tenant was entitled to under the Act of 1870 on quitting his holding. But I have examined the files of the proceedings in these cases, and find that subsequently this Court—then composed of Mr. Justice O'Hagan, Mr. Commissioner Litton, and Mr. Commissioner Vernon—fixed the specified value in each case at a sum exactly equal to five years' purchase of the judicial rent—that is to say, a sum apparently not depending directly on the value of the tenant's improvements. In the present case the only materials we have to ascertain the true value of the tenancy are to be found in the report of the Court valuers. Under section 37, sub-section 6, and section 48, sub-section 4, of the Land Act of 1881, the Court has full power to adopt and act on the report of such valuers, and, under the circumstances of the case, we are of opinion that the order of the Sub-Commission should be affirmed, and the true value fixed at £30. If the landlord so desires we shall state a case for the Court of Appeal as to whether the true value of the tenancy within the meaning of the 1st section of the Act of 1881, is restricted to the value of the improvements on the holding made by the tenant or his predecessors in title, for which he has not been paid or compensated by the landlord (1).

Solicitor for the landlord: *A. Stubbs.*

(1) The landlord subsequently applied to have such a case stated, and his application was acceded to.

D. M'C. M.

Q. B. Div.
1893.
Dec. 1, 3, 19.

Appeal.
1894.
May 3, 4, 11.

REG. (COGHLAN) *v.* INSPECTORS OF IRISH FISHERIES (1).

Salmon Fisheries (Ireland) Acts—Fixed net condemned by Commissioners as illegal—Injury to navigation—"Legally erected"—New inquiry—Mandamus, 26 & 27 *Vict. c.* 114, *s.* 40—*Application to re-enter appeal.*

In 1863, on an inquiry before the Fishery Commissioners as to the legality of a fixed net at D. in the county of Waterford, the Commissioners held that the fixed net was illegal on the ground that title was not shown, and also on the ground that the net was injurious to navigation. In 1864, upon appeal by way of special case stated for the Queen's Bench, an order was made affirming the order of the Commissioners, so far as same decided that the fixed net was injurious to navigation and should therefore be abated, the Court not deciding the question of title raised.

In 1893, C. (who was a minor at the date of the proceedings in 1863 and 1864), alleging that the injury to navigation had ceased, applied to the Inspectors of Irish Fisheries to hold an inquiry as to whether the weir was now injurious to navigation. An inquiry was held, and the Inspectors reported that the weir, if erected at D., would not now be injurious to navigation, but declined to issue a certificate under the Salmon Fisheries Act, 1863, as the question of title raised by the special case had been left undisposed of by the Court of Queen's Bench. C. then applied to the Queen's Bench Division for an order for a writ of *mandamus* directed to the Inspectors to hold an inquiry into his title to use a fixed net at D., or for an order commanding them to issue a certificate under the Salmon Fisheries Act, 1863, authorising him to erect a fixed net, or for an order that the appeal by way of special case stated might be reinstated for hearing as not finally disposed of:—

Held, by the Queen's Bench Division and the Court of Appeal, that the application should be refused; that, the appeal having been finally disposed of by the Queen's Bench in 1864, all jurisdiction of the Court in regard thereto was spent; that the fixed net had been finally and conclusively condemned in 1864 as injurious to navigation, and was not "legally erected in the open season of 1862"; and that no new inquiry was open.

Moore-Smyth v. *Devonshire* (Fishery Cases, June 17, 1871) and *Reg.* (*Reeves*) v. *Inspectors of Irish Fisheries* (20 L. R. Ir. 155) disapproved of.

Quære: Having regard to the provision of sect. 40 of the Salmon Fisheries (Ireland) Act, 1863, does *mandamus* lie to compel the Inspectors of Irish Fisheries to grant a certificate under that Act?

(1) In the Queen's Bench Division before HARRISON, HOLMES, and GIBSON, JJ.

MANDAMUS. Motion on behalf of James Duff Coghlan for a conditional order for a writ of *mandamus* directed to the Inspectors of Irish Fisheries, commanding them to hold an inquiry into his right and title to erect and use a fixed net for catching salmon or trout on the site of the fixed net commonly called a Scotch weir which formerly was erected in Waterford Harbour on the shore of Dromina in the county of Waterford, it having been found by the said Inspectors that the said weir would not be injurious to navigation, or for an order commanding them to issue a certificate under the provisions of the Salmon Fisheries (Ireland) Act, 1863, authorising said J. D. Coghlan to re-erect and use said fixed net or Scotch weir, or for an order that the appeal by way of Special Case stated for the Court of Queen's Bench in Ireland by the special Commissioners for Irish Fisheries, dated the 8th December, 1863, might be reinstated and relisted for hearing, same not having been finally disposed of by the order of the Court of Queen's Bench dated the 16th November, 1864.

Mr. Coghlan became possessed of the weir at Dromina, under the will of his grandfather, John Coghlan, in 1854; but being at that date a minor, his mother, Mrs. Coghlan, entered into possession of and worked and managed the weir from 1854 to 1863.

On the 9th October, 1863, the Fishery Commissioners summoned Mrs. Coghlan to attend an inquiry before them touching the legality or illegality of the said fixed net; and, this inquiry being held at Waterford on the 24th October, 1863, they decided that the said fixed net was illegal upon the ground that no title was shown under either the 18th or 19th sections of 5 & 6 Vict. c. 106; and also on the ground that the said fixed net was injurious to navigation.

From this decision an appeal was subsequently taken to the Court of Queen's Bench by Mrs. Coghlan, by way of Special Case stated by the Commissioners, who gave as the reasons for their decision that a common and much used course of smacks, yawls, and hobblers in navigating was from Passage to and beyond Credon Head at the extremity of the bay of Woodstown, and that lighters were in the custom of navigating that part of the estuary on their way from Waterford to Woodstown for the purpose of collecting sand and gravel, and that the position of the weir

Q. B. Div. 1893.

THE QUEEN v. FISHERIES INSPECTORS.

rendered the navigation inconvenient and dangerous to such boats. It does not appear that it was alleged that the weir was an impediment to the navigation of larger vessels.

The case came on for hearing before the Queen's Bench on the 22nd February, 1864, when an order was made affirming the order of the Commissioners, so far as it decided that the fixed net was injurious to navigation; and the matter was referred back to the Commissioners to report whether in their judgment a partial abatement or alteration of the fixed net would be sufficient to remove the injury. On the 10th August, 1864, the Commissioners made a report declaring that a partial abatement or alteration of the weir would not be sufficient to remove the injury, and accordingly on the 16th November, 1864, the Queen's Bench made an order confirming the order of the Commissioners, so far as it decided that the net was injurious to navigation. The Court did not decide the question of title which had been raised. Since the date of the order the weir had not been erected or fished.

The traffic of boats of the character mentioned in the Special Case having ceased in the estuary where the fixed net was situate, Mr. Coghlan applied to the Inspectors by memorial to hold an inquiry for the purpose of receiving evidence upon the question whether the weir if re-erected would be an injury to navigation. On the 3rd August, 1892, the Inspectors informed Mr. Coghlan that as a decision of the Queen's Bench had been pronounced with regard to the weir, they considered that, if the case were to be reopened, he should apply to the Queen's Bench for an order to that effect. Mr. Coghlan accordingly applied *ex parte* to the Queen's Bench Division for a conditional order for a writ of *mandamus;* and on the 29th November, 1892, an order was made suggesting that further application should be made to the Inspectors, with leave to apply to the Court anew, the Court expressing no opinion on the case.

Subsequently to the date of this order, the Inspectors of Irish Fisheries, on the application of Mr. Coghlan, held an inquiry at Waterford into the legality of the weir in so far as the same depended upon its being or not being injurious to navigation; and by their report, dated the 11th May, 1893, the Inspectors found that the weir if now erected at Dromina would not be injurious to

navigation. At the conclusion of the inquiry the Inspectors intimated to Mr. Coghlan's counsel that, even if they should find that the weir was not now injurious to navigation, they would be unable to issue a certificate to him under the provisions of the Salmon Fisheries Act, 1863, inasmuch as the question of title raised by the Special Case had not been disposed of by the orders of the Court of Queen's Bench on the 22nd February, 1864, and 16th November, 1864.

On the 13th June, 1893, an application was made *ex parte* to the Queen's Bench Division that the appeal by way of Special Case should be reinstated for hearing, but the Court declined to make the order on an *ex parte* application. An application was then made to the Inspectors to hold an inquiry into Mr. Coghlan's title to the weir, but after some correspondence the Inspectors declined to hold such an inquiry without an order from the superior Court.

The present application was accordingly instituted upon notice given by direction of the Court to the representatives of the parties to the appeal by way of Special Case in 1864.

The Right Hon. J. Atkinson, Q.C., George Wright, Q.C., and *Cherry*, appeared for the applicant.

Seymour Bushe, Q.C., and *Feely*, for the owner of a fishery adjoining the Dromina weir, opposed the application (1).

C. Mac Dermot, for the Inspectors.

Cur. adv. vult.

Dec. 19.

HARRISON, J.:—

In this case a motion has been made for a conditional order for a writ of *mandamus*, directed to the Inspectors of Irish Fisheries, commanding them to hold an inquiry into the right and title of James Duff Coghlan to erect and use a fixed net for catching

(1) In the argument before the Queen's Bench Division the previous decision of that Court in *Reg.* (*Reeves*) v. *Inspectors of Irish Fisheries* (20 L. R. Ir. 155) was accepted as binding upon the point, that where a fixed net had been condemned as injurious to navigation a fresh investigation might be subsequently held.

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salmon or trout on the site of the fixed net, commonly called a Scotch weir, which formerly was erected in Waterford Harbour at a place named, it having been found by said Inspectors that said weir would not be injurious to navigation, or for an order commanding them to issue a certificate under the provisions of the Salmon Fisheries (Ireland) Act, 1863, authorising said James Duff Coghlan to re-erect and use said fixed net or Scotch weir; or for an order that the appeal by way of Special Case stated for the Court of Queen's Bench in Ireland by the special Commissioners for Irish Fisheries, dated the 8th December, 1863, may be reinstated and relisted for hearing, same not having been finally disposed of by the order of the Court of Queen's Bench, dated the 16th November, 1864.

In the year 1863 an inquiry was held by the then Commissioners of Irish Fisheries to ascertain the legality or illegality of the weir or fixed net mentioned in the notice of motion which was situate in an estuary of the River Suir in Waterford Harbour. The present applicant, who then claimed to be entitled to use said fixed net, was at that time a minor, and his mother and alleged guardian, Mrs. Eliza Coghlan, appeared at said inquiry on his behalf to support his claim. The Commissioners decided against the applicant's title to fish the fixed net in question, and, by their order, of the 24th October, 1863, decided that the said fixed net was illegal upon the ground that no title to fish same was shown under the 18th or 19th sections of the 5 & 6 Vict. c. 106; and also on the ground that the said fixed net was illegal as being injurious to navigation. And the Commissioners further decided that said fixed net should be abated and removed. Mrs. Eliza Coghlan appealed against this order of the Fishery Commissioners, and the Commissioners, in pursuance of the provisions of the Fisheries (Ireland) Act, 1863, stated a Special Case for this Court in which they stated the facts and grounds for the decision. The Special Case set forth the applicant's title very fully, and stated the mode in which said fixed net had been fished, and also stated the reasons of the Commissioners for holding said fixed net to be injurious to navigation.

By order of this Court of the 22nd February, 1864, the order of the Fishery Commissioners of the 24th October, 1863, was

affirmed so far as the said order decided that the said fixed net was injurious to navigation, and the matter was referred back to the Commissioners to report whether, in their judgment, having regard to the evidence given in the case, a partial abatement of the fixed net would be sufficient to remove the injury caused by it to navigation.

The Fishery Commissioners having reported that a partial abatement of the said fixed net would not be sufficient to remove the said injury, this Court, on the 16th November, 1864, made an order confirming the order of the Commissioners so far as same decided that said fixed net was injurious to navigation, and therefore ought to be abated and removed, the Court, however not deciding or adjudicating as to the matters or questions of title mentioned in or decided by said order.

The affidavit of Mr. Michael D'Alton, the applicant's solicitor, filed the 14th November, 1893, states what proceedings have been taken in this matter subsequent to the order of this Court of the 16th November, 1864. From this it appears that counsel on behalf of the present applicant, on the 29th November, 1892, moved this Court *ex parte* for a conditional order for a *mandamus* similar to that now asked for; and that, on 29th November, 1892, a ruling was made in the following terms: "The Court suggests that further application should be made to the Inspectors, with leave to apply to the Court here anew, the Court expressing no opinion on the case one way or the other." Mr. D'Alton further states that, subsequently to the date of said order, the Inspectors of Irish Fisheries, on the application of the present applicant, held an inquiry at Waterford into the legality of said weir in so far as the same depended upon its being, or not being, injurious to navigation, and that the said Inspectors found, on the evidence given before them, that the said weir, if now erected at Dromina, would not be injurious to navigation, but intimated, at the conclusion of said inquiry, that, even if they should find that the said weir was not now injurious to navigation, they should be unable to issue a certificate to said applicant under the provisions of the Salmon Fisheries Act, 1863, inasmuch as the question of title raised by the special case had not been disposed of by the orders of this Court of the 22nd February, 1864, and

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16th November, 1864. Mr. D'Alton further states that an *ex parte* application was made to this Court, on the 13th June, 1893, that the appeal, the subject matter of the Special Case, should be reinstated for hearing, but the Court declined to make the order asked for on an *ex parte* application; and, the Secretary of the Fishery Inspectors having informed Mr. D'Alton that they did not feel at liberty to hold an inquiry into the applicant's title in the absence of an order from the Superior Court, the present application has consequently been made.

That application seeks for a *mandamus* commanding the Inspectors of Irish Fisheries to hold an inquiry into the applicant's title to erect said fixed net; or for an order that the appeal, by way of Special Case, dated the 8th December, 1863, may be reinstated and relisted for hearing, same not having been finally disposed of by the order of the 16th November, 1864. The portion of the notice of motion by which an order is sought commanding the Fishery Inspectors to issue a certificate to the applicant under the provisions of the Salmon Fishery Act (Ireland), 1863, authorising him to re-erect and use said fixed net, was not referred to in the argument; and it is clear that same is quite untenable, and that such a certificate could not issue so long as the order of the 16th November, 1864, remains in force.

I am of opinion that the other branches of the present application must equally fail. The Commissioners of Fisheries held a full and exhaustive inquiry into that title in the year 1863, and decided against its validity. That decision could only be questioned by an appeal to this Court in pursuance of the provisions of the 14th section of the Salmon Fisheries (Ireland) Act, 1863. Such an appeal was taken, but the decision of the Commissioners was not reversed or varied on the hearing of said appeal, and it must be deemed to be now in full force and effect. At the end of thirty years we are asked to order a fresh inquiry into the applicant's title; but I am of opinion that no jurisdiction has been shown to entitle this Court to order such an inquiry to be held. The 40th section of the Act of 1863 expressly provides that the Commissioners shall not be required by writ of *mandamus* or any writ of a like nature, to do any act or take any proceedings under the said Act. Nor does it appear that any application similar to

the present for an order to have a fresh investigation of title, after same has been decided by the Commissioners to be invalid, has ever been made. The decision of this Court in the case of *The Queen* (*Reeves*) v. *Inspectors of Irish Fisheries* (1) merely decides that a fresh investigation may be held as to whether a weir, previously condemned, would, if re-erected, be an obstruction to, or injurious to, navigation, and that the fact that a former inquiry had been held, which resulted in the condemnation of the weir on this ground, was not a bar to the holding of another inquiry. But that does not decide that a fresh inquiry can be held as to title; and I am of opinion that no such inquiry can be held, there being already a decision on this point, and an adjudication by the Fishery Commissioners condemning the weir.

There remains the last branch of the present application, viz.: that the former appeal by way of Special Case may be reinstated and relisted for hearing, on the ground that same has not been finally disposed of by the order of the 16th November, 1864. On this point, I was disposed to think, during the argument, that the Court should reinstate and relist the said appeal; but, on consideration, I cannot see my way to making such an order. The 13th sub-section of the 14th section of the Salmon Fishery (Ireland) Act, 1863, provides that the decision of the Court of Queen's Bench in respect of any case brought before them under this section shall, unless the Court otherwise directs, be final. The Court by that order affirmed the decision of the Commissioners so far as same decided that said fixed net was injurious to navigation, and therefore ought to be abated and removed, the Court not however, deciding or adjudicating as to the matters or questions of title mentioned in or decided by said order. I do not think this declaration at the end of the order amounts to a direction that the order of the Commissioners on this branch of the case shall not be final. By the order of the 16th November, 1864, the Court decided on one point of the appeal brought before it, which all parties must be taken as acquiescing in as a final adjudication on the appeal. The appellant, if dissatisfied with the decision, should have then required the Court to decide upon the other grounds of appeal;

(1) 20 L. R. Ir. 155.

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but no such application would appear to have been made, and the parties must now, I conceive, be bound by what was then done; and the present applicant cannot now require after the lapse of time which has occurred that the case should now be reopened.

I am therefore of opinion that the present application should be refused.

HOLMES, J. :—

I am of opinion that there is no branch of this application that can be sustained. I have grave doubts as to whether under any circumstances the Inspectors of Fisheries can be ordered by writ of *mandamus* to hold an inquiry or to grant a certificate under the provisions of the Salmon Fishery (Ireland) Act, 1863. I said, during the argument, that I regarded the case of *The Queen* (*Reeves*) v. *Inspectors of Irish Fisheries* (1), as an authority for the proposition that the fact of a former inquiry having been held and having resulted in the condemnation of a weir on the ground of its being injurious to navigation is no bar to a subsequent inquiry. To this extent I consider myself bound by that decision, and although I should probably have come to a different conclusion if the matter were now before the Court for the first time, I have no desire to assume the functions of an appellate tribunal. That case, however, does not decide that the Inspectors can be ordered to hold an inquiry by writ of *mandamus*. The application was neither refused nor granted; and, if it had been afterwards renewed, I presume that this question would have still remained open for argument. The 40th section of the statute of 1863 enacts that the Commissioners, whose powers, privileges, and duties have been transferred to the Inspectors, shall not be required by writ of *mandamus* or any writ of a like nature to do any act or to take any proceedings under this Act. The only authority enabling the Inspectors to hold an inquiry or to grant a certificate is contained in the Act quoted, as the same is amended by 32 & 33 Vict. c. 92, and it seems to me that the provision I have read prohibits in the clearest terms this Court from issuing such a writ of *mandamus* as is now applied for. Can any reason be suggested

(1) 20 L. R. Ir. 155.

for not giving to the prohibitory words their natural meaning? There is nothing repugnant to legal principles, or to constitutional usage, in the notion that a tribunal called into existence by Parliament for a special purpose should be given uncontrolled authority and discretion in the performance of its duties. Indeed, the inconvenience of and objections to this Court determining at what times, and under what circumstances, inquiries under the statute ought to be held, are so manifest that, even without the 40th section, I should be disposed to think that any default by the Inspectors in reference thereto cannot be corrected by writ of *mandamus*.

I shall illustrate the difficulty involved in such a course by reference to the case of a weir condemned as injurious to navigation. In such a case there may be, according to the view of the law taken on former occasions by this Court, a subsequent inquiry for the purpose of ascertaining whether, if the weir were then in existence, it would be still injurious. Upon this principle, there might be inquiry after inquiry; but I suppose it will not be argued that the owner of a condemned weir is entitled to a new inquiry when and as often as he is pleased to ask for it. How then can this Court determine that he is entitled to it at the time he makes the application? Would it be our duty to consider whether there has been since the last inquiry such a change either in the conditions of the locality or in the ways of mariners as to make it probable that the Inspectors will reverse their previous decision? And are we to take into account in favour of the applicant the possibility that a tribunal, differently composed from that which made the former order, may not see with the same eyes as its predecessor?

It is said that in the case of *Lord Listowel's Fishery* (1) it was assumed that a writ of *mandamus* would lie to the Inspectors of Fisheries to hold an inquiry. In that case there had been two orders of the Commissioners of Fisheries declaring a weir and a fixed net illegal, and ordering their abatement or removal. The primary application to this Court was for a writ of *certiorari* to bring up these orders for the purpose of having them quashed on the grounds that they were made in excess of jurisdiction, or

(1) Ir. R. 9 C. L. 46.

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without jurisdiction, and that they were bad and void on their face. I am of opinion that such an application would lie, notwithstanding the provision of the 40th section that proceedings before the Commissioners shall not be removable by *certiorari*, a provision that can only apply to proceedings which the statute gives them authority to entertain, and affords no protection to orders made in excess of their jurisdiction. This was the matter discussed both in argument and in the judgment of the Court, and, when the writ of *certiorari* was refused, there was of course no necessity for considering the application for a *mandamus*. Under these circumstances, I cannot regard that case as an authority for the proposition that this Court can, in defiance of an express enactment, require the Inspectors by writ of *mandamus* to do an act or take a proceeding under the statute of 1863.

I do not, however, desire to rest my judgment upon the 40th section. I see no answer to the inference I draw from it; but as it has not been referred to by counsel on either side, I prefer to keep this point open for further discussion. However it may be ultimately decided, I am clearly of opinion that the writ ought not to issue in the present case. The former Commissioners held an inquiry in the year 1863, and condemned the weir not only on the ground that it was injurious to navigation, but also because, apart from this, the present applicant had no right or title to erect or keep it erected. An appeal was taken to the Court of Queen's Bench. It was proceeded with, in the manner provided by the statute, upon a Special Case, stating the facts and grounds of the Commissioners' decision. The result was to affirm their order. No doubt the only matters considered by the appellate tribunal were some preliminary objections to the validity of the summons, and whether the weir was injurious to navigation. Having decided these points against the appellant, the Court thought it unnecessary to consider the other questions dealt with by the Commissioners; and it does not appear to have been asked to do so. Perhaps Mr. Brewster did not anticipate the judgment in *Moore-Smyth* v. *The Duke of Devonshire* (1). He may also have thought it highly improbable that a weir, causing in 1864 injury

(1) Fishery Cases, June 17, 1871.

to navigation incapable of being remedied by any structural alteration, would have became quite harmless in 1893. Be this as it may, the decision of the Commissioners was untouched by the Queen's Bench, and I am of opinion that the Inspectors are not at liberty to inquire into the question of title adjudicated upon by their predecessors.

This disposes of the first part of the application; and the second branch of it is equally untenable. Even if the appeal were still open, I should feel great hesitation in re-entering it for hearing after an interval of thirty years. But it is clear that it was finally disposed of; and the Court has now no jurisdiction to reopen it.

I regret that the Inspectors and the parties have incurred the trouble and expense of an inquiry which could lead to no result. I fear that the form of the order of this Court misled the Inspectors; but it was never our intention to call for a report. On the two former occasions on which this case has been brought before the Division, I believe that none of the Judges present contemplated that any other order should be made than that of "no rule," with a reservation of the appellant's right to renew his application if he were so advised.

Strictly construed, the order made up does not, perhaps, go beyond this; but there is much in its form and language calculated to lead the Inspectors to think that the Court suggested that they ought to take some action. The present application must be refused, and the order will not be likely on this occasion to give rise to any misconception.

GIBSON, J.:—

The Inspectors appear to have held an inquiry and sent in a report in this case under some misapprehension, for which, however, they are in no wise to blame. When the question of *mandamus* was first brought forward, it was pointed out that there was no refusal on the part of the Inspectors to adjudicate. The Court declined to express any opinion as to whether the Inspectors ought or ought not to hold an inquiry. I did not understand that any order was intended to be taken out. If any order was made, it was "no rule." It is certainly inconvenient, and tends

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to misconception, for the Court to address the Inspectors in communications which are not orders, and which are founded on *ex parte* statements.

Two substantial questions were raised by this motion. The first of these, in logical order, is whether the original appeal can be reinstated and argued on the questions not formally determined by the original order. In my opinion this part of the motion is clearly unsustainable. In the first place, the parties to the original appeal are not before the Court. Secondly, the appeal is spent, and was finally disposed of. The adjudication pronounced by the Court, which was exercising a special and limited jurisdiction, is in quite a usual form. It is common for the Court to affirm the decision below on one ground without deciding upon the other points decided by the Commissioners. I have examined the Court records; and orders like the present will be found in *Mayne* v. *Malcomson* (1), *Reeves* v. *Malcomson* (2), and *Annaly* v. *Malcomson* (3). In several cases, e. g. *Knox* v. *Lord Lismore* (4), the Court made no final order, but remitted the matter to the Commissioners for further inquiry and report. In the long period that has since elapsed there is no precedent for an application like the present, where the order was final, and there was no liberty to apply reserved: see *O'Neill* v. *Maguire* (5).

In my opinion the Court of Queen's Bench here intended to pronounce a final adjudication against this weir; the appeal was then spent and exhausted; and it is out of the question, after nearly thirty years, to treat the points, which the Court did not think fit to determine originally, as still open and capable of being decided on the old appeal. If the Court had intended that the appeal should be kept open and pending indefinitely, it ought to have expressed that extraordinary meaning in clear language. Take an analogous case in the superior Courts. An action is brought for debt for goods, and there are two defences, one that the action was premature, owing to an unexpired credit; another that the debt was satisfied by accord and satisfaction. The Court below might hold both defences proved. On appeal, the Court of

(1) 10 Ir. Jur. (N. S.) 390.
(2) *Ibid.* 392.
(3) Fishery Cases, May 1, 1866.
(4) Fishery Cases, May, 1866.
(5) Fishery Cases, May 28, 1869.

Appeal might conceivably affirm the decision on the first point, and pronounce no decision on the second; but such an order would none the less dispose of the entire appeal. Obviously such a course would not be likely to be taken, as the first point would only be an answer to the plaintiff's present action, and would not extinguish his right. And as a matter of course the Court would, if required, be obliged to dispose of the second defence. If in the present case counsel for the appellant had not regarded the condemnation of the weir on the ground of injury to navigation as final, and incapable of being reopened, they would unquestionably have insisted on the Court deciding all the points raised by the Commissioners. The action of counsel and the Court supplies a strong inference that the decision, in the opinion of all concerned, extinguished the weir for ever. There was no attempt made in 1864 to suggest a partial abatement, probably because the nuisance could not be obviated without destroying the fishing capacity of the weir. The weir as fished in 1862 was condemned as an entire thing.

The second point raised is whether, if the appeal cannot be reinstated as pending, the applicant is not entitled to an order directing a new inquiry to be held. To some extent this depends on the effect of the original Queen's Bench order. If it was final, completely disposing of the appeal, no further inquiry should be held. Had it been the intention of the Court that the appellant should be at liberty to insist on a new inquiry at some future time, would it not have discharged so much of the decision of the Commissioners as would constitute a bar, or would it not at least have inserted some special direction or reservation of liberty to apply in its order? Were a new inquiry now to be held, it is doubtful whether the old evidence could be utilized, and certainly any amount of new evidence could be given. The inquiry would be entirely at large. It is not the fact that (as suggested in argument) all the evidence must be documentary. One of the grounds on which the weir was condemned was because it extended below low-watermark of ordinary spring tide; and this, if the entire fishing part was below, would make the weir illegal: *Reeves* v. *Malcomson* (1). On this point there might be loss of evidence

(1) 10 Ir. Jur. (N. S.) 392.

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and danger of perjury from the lapse of time. A further objection is that a new inquiry might be utilized as an indirect means of subverting the former decision of the Commissioners, without any real alteration of facts and evidence. The question of injury to navigation is, according to the appellant's argument, a pure question of fact, on which tribunals—and I say this without any reflection on the ability or learning of the present Fishery Inspectors—might be largely guided by idiosyncrasy; and on substantially identical materials the present Inspectors might arrive at a conclusion quite contrary to that adopted by the former Commissioners. As section 40 of the statute of 1863 was not mentioned by counsel on either side in argument, I do not wish to express any opinion as to its scope and operation in prohibiting *mandamus*. *Lord Listowel's Case* (1) is not without bearing on the case before us. In *Gregg's Case* (2), in the collection of Fishery cases furnished to the Court by the courtesy of Mr. Roche, where the weir had been abated as a nuisance to navigation, the lapse of thirteen years was held a bar to the application. The weir here has for nearly a generation been regarded as dead, and persons have probably acted on that assumption. It is now sought to be revived, not, as I believe, so much from any alteration in navigation, as from the decision in *Reeves' Case* (3). There is no proof of the time when navigation changed so as to justify an application to review the former decision. *Reeves' Case* (3) was very different from the present, as there the Rusheen weir was condemned on the ground of injury to navigation alone, and no *mandamus* was given to compel the Inspectors to hold an inquiry. Here the weir was condemned by the Commissioners on several grounds.

Should the above reasons for refusing the *mandamus* asked for be deemed insufficient, it may be necessary to consider whether the original decision condemning the weir as injurious to navigation may not be conclusive and a bar to the present application. No doubt the question must be regarded as concluded in this Court by authority, but as the point may have to be considered elsewhere, and as the matter is of great importance, I may be

(1) Ir. R. 9 C. L. 46. (2) Fishery Cases, June 9, 1877.

(3) 20 L. R. Ir. 155.

permitted to state briefly my reasons for concurring in the able judgment of Lord Fitz Gerald who dissented from the majority of the Court in *Moore-Smyth* v. *Devonshire* (1), the case which first decided the point, and on which the recent decision in *Reeves' Case* (2) was based. That distinguished Judge held that the adjudication was *in rem*, and that a weir which, as erected for fishing in the open season of 1862, was then injurious to navigation, was illegally erected, and was within the prohibition of section 4 of the Act of 1863. The fact appears to be sometimes lost sight of that these fixed weirs are against common right and are nuisances. Persons who claim that such nuisances are legalized ought to be able to justify them by distinct statutory warrant. The Court does not strain language to perpetuate a nuisance at the expense of the public and upper owners. Is the condemnation on the ground of injury to navigation an adjudication *in rem*?

This case illustrates the grave inconvenience of regarding the decision as only applicable to the particular state of circumstances at the time. Four witnesses were examined on behalf of the defendants at the original inquiry, Hearn, Tobin, Meyler, and Rickens, who were all boatmen, and who proved injury to navigation by small craft. The weir projected 662 yards into the estuary, the width of which at low water was 3666 yards, and at high water 4760 yards. The supposed cessation of injury to navigation is not owing to any proposed abbreviation of the weir, as in *Moore-Smyth's Case* (1), but (as I understand from Mr. Cherry) is attributable to the fact that a quarry, which used to give employment to boats, is now worked out. I do not find this quarry referred to in the original evidence. The weir now sought to be reinstated is the selfsame thing that was condemned, and there has been no alteration of the course or bed of the river, nor was any change of structure ever suggested. Without any substantial alteration of circumstances, the present Inspectors might find that there was no injury to navigation on evidence which, in the opinion of their predecessors, conclusively established such injury. Again, the injury to navigation, to justify condemnation, ought to be something of a *quasi* permanent character, and not

(1) Fishery Cases, June 17, 1871. (2) 20 L. R. Ir. 155.

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depend on the accidental stoppage or volume of river traffic at the moment of inquiry. Mr. Atkinson argued that if a weir, certified as not injurious to navigation, afterwards turned out to be injurious, it could be abated as a nuisance, and that this pointed to the decision of the Commissioners being of a transitory character. The final proviso in section 7 of 26 & 27 Vict. c. 114 shows that this argument is inadmissible. A certificate in favour of a weir does not legalize it, if it is in violation of common law or of any Act of Parliament. The proviso is not limited to cases of injury to navigation, but extends to every case where the weir is contrary to any statute. The object of Parliament was to ascertain once for all the legality of a weir by reference to its condition as actually erected for fishing in the year 1862: *Mayne* v. *Malcolmson* (1). The question depends on the meaning of the words "legally erected," occurring in section 4 of the Act of 1863.

Mr. Justice O'Brien in *Moore-Smyth* v. *Devonshire* (2) based his judgment, which he arrived at with difficulty and doubt, on section 5, which he thought drew a distinction between legality and injury to navigation, and he accordingly interpreted the expression "legally erected" in section 4 with reference to that distinction. Section 5 is not happily constructed, but unless injury to navigation is included in legality, the section would, at first sight, if taken by itself, appear to order the abatement of weirs injurious to navigation without any inquiry at all, the provision as to inquiry being limited to legality. Injury to navigation certainly makes a net "illegal" under sections 6 and 13. Legality in sect. 4 cannot be confined to title; a weir erected in violation of sect. 26 of 5 & 6 Vict. c. 106 would clearly fall within sect. 4 of the Act of 1863. The language employed in the Fishery Code is not marked by scientific accuracy. In 5 & 6 Vict. c 106, s. 21, a weir injurious to navigation is spoken of as a nuisance, which it certainly is. A weir coming within 13 & 14 Vict. c. 88, s. 14, is also described as "a nuisance" and condemned as such. According to Mr. Conner's view of the authorities in his very valuable and complete book, "nuisance" in this latter section has been held to be restricted to engines illegal from want of title. If this

(1) 10 Ir. Jur. (N. S.) 390. (2) Fishery Cases, June 17, 1871.

were so, a net illegal under 5 & 6 Vict. c. 106, s. 26, as extending below low-water mark, would not be within sect. 14 of the latter Act, which is I think impossible.

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The importance of this case is such that I shall be glad if it is taken to the Court of Appeal which may feel at liberty to review the decisions on the subject and lay down a final principle of interpretation.

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Appeal. 1894. May 3, 4, 11.

Mr. Coghlan appealed to the Court of Appeal (1).

The same counsel appeared for the respective parties.

WALKER, C:—

May 11.

The application to the Queen's Bench in November, 1893, was one presenting three alternatives. The first was a conditional order for a writ of *mandamus* directed to the Inspectors, commanding them to hold an inquiry into the right and title of Mr. Coghlan, to erect and use a fixed net for catching salmon or trout, on the site of the fixed net commonly called a Scotch Weir, formerly erected in Waterford Harbour, on the shore at Dromina, it having been found by the said Inspectors that said weir would not now be injurious to navigation; or (2) for an order commanding them to issue a certificate under the provisions of the Salmon Fisheries (Ireland) Act, 1863, authorizing Mr. Coghlan to re-erect and use said fixed net; or (3) for an order that the appeal by way of special case stated for the Court of Queen's Bench, and dated the 8th December, 1863, may be reinstated and relisted for hearing, same not having been finally disposed of by the order of the Queen's Bench, dated the 16th November, 1864. The second branch of the application was not argued and may be passed by.

It appears that the then Commissioners, on the 9th October, 1863, summoned Eliza Coghlan, the mother of the present appel-

(1) In the Court of Appeal, before WALKER, C., PALLES, C.B., and FITZGIBBON and BARRY, L.JJ.

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lant, and representing his estate, to appear before them on an inquiry touching the legality or illegality of this fixed net at Dromina. The inquiry was held, and the Commissioners on the 24th October, 1863, made an order declaring that the fixed net was illegal, and further ordered that same should be abated and removed.

There was an appeal in the usual way to the Queen's Bench by way of special case, and the case elaborately sets forth the proceedings upon the inquiry. It sets forth evidence of title produced on the part of the Coghlan family consisting of various deeds and documents and acts of ownership: it also sets forth evidence of the character of the structure, the extent of its projection into the estuary, the width of the estuary, and circumstances tending to show an impediment to navigation in the case of certain vessels; and it stated the decision of the Commissioners that the fixed net was illegal, and in contravention of Acts of Parliament and law. First, that it was not legally erected during the open season of 1862, or at all in that year, on several defects in title stated, nor in the year 1863. The second ground in effect was stated to be that the fixed net was, during the years 1862 and 1863, so placed and erected as in the judgment of the Commissioners to be injurious and detrimental to navigation.

On the 22nd February, 1864, an order was made by the Queen's Bench, that it should be referred back to the Commissioners to report whether in their judgment, having regard to the evidence given in the case, a partial abatement or alteration of the fixed net would be sufficient to remove the injury caused by its present state. The Commissioners made their report on the 10th August, 1864, that in their judgment a partial abatement or alteration of the weir would not be sufficient to remove the injury caused by it to navigation, and that report having been brought before the Queen's Bench on the 16th November, 1864, an order was made that the order of the Commissioners should be affirmed, so far as same decided that the said net was injurious to navigation, and therefore ought to be abated and removed, the Court not, however, deciding or adjudicating as to the matters or questions of title mentioned in or decided by the said order.

So far the matter rested for nearly thirty years, and on the

29th November, 1892, an application was made to the Queen's Bench for a conditional order for a *mandamus* to hold an inquiry into the right of Mr. Coghlan to obtain a certificate authorizing him to erect and use this fixed net, the subject of the order of the 24th October, 1863. The Court suggested that further application should be made to the Inspectors and expressed no opinion. It appears the Inspectors on the 11th May, 1893, held an inquiry, and made in some informal way a report that the fixed net would not now be injurious to navigation. An application was then made to them to hold an inquiry into the title of Mr. Coghlan to the weir, which they ultimately declined to hold, on the ground that the questions had been adjudicated upon in the former proceeding. The present motion in the Court below was then instituted.

As regards the third branch of the application, viz., to now re-enter the special case and deal with a branch of the appeal not adjudicated on in 1864, I think no such order could be made. That appeal was in substance and form disposed of by the Queen's Bench, and I think all jurisdiction in respect of it is spent. Once the Court decided that the fixed net was injurious to navigation, the structure became one in respect of which title was irrelevant, and a matter there was no jurisdiction to inquire into. At all events the appeal and special case have ceased to exist as a subject of jurisdiction on this point.

The first branch of the application remains, and involves two considerations—(1), whether there is a remedy by *mandamus* against the Inspectors having regard to the provisions of the 40th section of the Act of 1863; and (2) whether, on the merits, such an application can in a case like this be sustained. I guard myself against expressing an opinion that the discretion of the Court in granting a *mandamus* should be exercised after thirty years. As to the right to grant a *mandamus* it is true that the language of sect. 40 is precise and clear. I have looked through all the cases. There are several in which a *mandamus* was sought, but there is not one in which the right to obtain it was affirmed, and there is much force in the judgment of Mr. Justice Holmes on this point in the Court below; but it opens a serious constitutional question whether the prerogative writ of *mandamus* to enforce a

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duty in which the public are interested has been taken away, and it is to be observed that the Act of 1869 gives additional powers to the Commissioners, being silent about *mandamus* save so far as the incorporation of the code can be relied on to make the 40th sect. applicable.

It is open to us, however, to consider in this Court the merits of the application, and if we are of opinion that on the merits the application cannot be sustained, we are not bound to express any opinion on this question of jurisdiction.

The Chief Baron has, on this point, referred me to the case of *Steers* v. *Rogers* (1), where Lord Herschell said:—"At the outset of the hearing of this appeal objection was taken to the appeal being heard, on the ground that there was no jurisdiction, inasmuch as this was an appeal from an interlocutory order made in an action, that the action had itself been dismissed, and that there was no appeal depending in your Lordships' House or elsewhere against that dismissal. It is not necessary to express any opinion, and I must not be taken as expressing any opinion as to whether that point was a good or a bad one, and whether or not, therefore, in fact there is jurisdiction to entertain this appeal, inasmuch as I believe all your Lordships are of opinion that on the merits there is no ground for this appeal, and that the appeal must be dismissed. The question of jurisdiction therefore becomes immaterial." I shall proceed therefore to consider whether it is competent to re-open the question of the legality of this fixed net under the circumstances. The appellant has undoubtedly in his favour the opinions of the majority of the Judges in *Moore-Smyth's Case* (2), expressed some thirty years ago, and to some extent, of two Judges, in the case of *Reeves* v. *Inspectors of Fisheries* (3), and as the case is an important one, and may affect the rights of other weir owners, it is necessary to consider carefully the legislation on the subject, in this somewhat complex fishery code. Section 18 of the Act of 1842 recites that doubts had arisen as to the rights to use fixed nets for catching salmon in the sea and tide ways, and then sects. 18 and 19 proceed to state the persons who are to have the title to erect fixed nets, viz., owners

(1) App. Cas. 1893, p. 232. (2) Fishery Cases, June 17, 1871.
(3) 20 L. R. Ir. 155.

of several fisheries, and persons, occupiers having certain estates in land, and lessees for specified terms, with certain restrictions. Then the 21st section provided that no stake or fixed net is to be so placed as to be injurious or detrimental to navigation, and in case a stake or fixed net should be so placed, it should be lawful for the Commissioners to declare it a nuisance, and to order the persons erecting such weir to abate and remove it, and if any person should again create the like nuisance, he should be liable to a penalty. This strikes at all fixed nets, injurious to navigation, no matter what the title, and must limit the powers given under sects. 18 and 19. Then comes sect. 22, which provides that in any estuary or mouth, or tidal part of any river, where the breadth of the channel, at low water of spring tides, is less than three quarters of a mile statute measure, only the proprietor of a several fishery, in the whole of the estuary and river, may erect fixed nets, and where the breadth of the mouth is less than half a mile, only the proprietor of a several fishery, within its limits, may place or erect such weir, within a mile seaward, coastwards, or inwards from the mouth, and if any person shall offend by erecting such weir, he should be liable to a penalty. The 23rd and 24th sections contain savings of certain nets from the operation of sect. 22. The next statute was the 8 & 9 Vict., c. 108, which, by sect. 2, extended the provision of sect. 22 of the Act of 1842 to persons who *fish with or use* as well as *place or erect* a weir or fixed net. Sect. 3 gave powers of abatement over weirs and nets erected contrary to sect. 22 of the former Act, and after specifying the procedure for the abatement and removal of the weirs, it contained a proviso that if the person who erected such weir or net had a fair and reasonable supposition that he had a right to do so, he might appeal to the Judges of Assize. Sect. 4 contained provisions regulating the appeal. Sect. 5 imposed a penalty on persons (other than those entitled to do so within sects. 18 and 19 of the Act of 1842) who erect, use, or fish, with weirs or fixed nets, and provided that such weirs or fixed nets might be removed in like manner as provided by the former Act for illegal nets; and sect. 6 imposed further penalties in the case of persons re-erecting or using weirs decided to be illegal within sects. 2, 3, and 5.

The Act of 1845 therefore does not refer to fixed nets injurious

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to navigation. The next Act, the 13 & 14 Vict. c. 88, has a wider scope, and it will be found that the legislation is still progressive. By section 14, it is enacted that when any party complaining of the erecting, maintaining, or of *using* any weir or fixed nets, shall exhibit to the Commissioners his complaint in writing, setting forth such particulars as are *in the like case* required by 8 & 9 Vict. c. 108—"in the like case" there means in the like kind of complaint—the Commissioners shall summon before them the party or parties erecting, maintaining, or using such weir or net, and it should be lawful for the Commissioners after hearing the evidence to order that such weir should be abated and removed. Section 15 provides that if any person is aggrieved by such order or decision of the Commissioners he may appeal to the next going Judges of Assize at the Assizes for the county where the weir or net shall have been so erected or used. In my opinion that appeal extends to every case, for example, to the case of a weir injurious to navigation. Then section 17 provides penalties for erecting or re-erecting weirs after conviction. Then section 18 is important; where any order shall have been made for abating or removing a weir or fixed net merely by reason of its having been erected or used on the soil and without the permission of the person claiming to be the lawful owner and for no other reason, such person shall not be thereby prevented from afterwards erecting, re-erecting, using or fishing with any such weir or net in or adjoining or contiguous to the place wherein it may have been decided by such Court that the said first named weir or fixed net should be abated or removed.

These appear to me to be sections applicable to all cases, and they are part of the general code incorporated with all subsequent legislation.

Passing to the 26 & 27 Vict. c. 114, it is of course of great importance to determine the true construction of section 4. If its meaning is this, no net shall be placed or used for catching salmon or trout in any inland or tidal waters unless it was in use during the open season of 1862, and was then a legal erection, it determines the case against the present weir. If it means only erected by a person having a legal title to erect a fixed net under the code, then I think we are still referred to the construction and

effect of section 5, as bearing on the particular case we have to deal with. The majority of the Judges of the Queen's Bench in *Moore-Smyth's Case* (1) were certainly of opinion that it should receive the limited construction, and if anything can be definitely collected from the report of *Reeves' Case* (2) it would seem to follow that such was the opinion of the two Judges who heard that case. On the other hand, there is the high authority of Lord Fitz Gerald, and Mr. Justice Gibson in this case, that it applies to every species of illegality. Judge Gibson says:—"The object of Parliament was to ascertain once for all the legality of a weir by reference to its condition as actually erected for fishing in the year 1862." The word "illegal" in sections 6 and 13 plainly includes fixed nets injurious to navigation, and the word "legally" in section 4 does not receive its full force, nor the force it bears in other parts of the Act, if it be translated "by a person having a lawful title to erect it." On the other hand, the adjudication mentioned in section 5, seems to contemplate the condition of the net at the date of adjudication, and not what might be a long antecedent one, and the placing of such vast powers in private hands as is conferred by section 4, seems inconsistent with the precedence of the legal inquiry and adjudication in section 5. The inclination of my own opinion is to that more limited construction, but wholly irrespective of that question, I entertain a clear opinion that the fixed net in this case was finally and conclusively condemned in 1864.

In *Moore-Smyth's Case* (1) the injury to navigation consisted in the character of the structure. This structure was afterwards altered. Mr. Justice George, in giving judgment, said, "The Court has upon several occasions where a weir was injurious to navigation, declared that the Commissioners should say whether there could be any abatement of the nuisance, and in a great variety of cases that came before the Court there were reports from the Commissioners that changes had been made in the weir, diminishing the projections, whereby the weir ceased to be injurious to navigation. I would say," he says, "that the order of August, 1864, should not be a bar to a further inquiry upon

(1) Fishery Cases, June 17, 1871. (2) 20 L. R. Ir. 155

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both the points, nor preclude Mr. Smyth from showing that, though by a former order the weir was held to be injurious to navigation, it had ceased, in consequence of the essential changes that had been made in the weir, to be injurious."

The judgment of O'Brien, J., is to the same effect.

In *Moore-Smyth's Case* (1) also the Queen's Bench had a pending proceeding before them in which an appeal lay. If *Moore-Smyth's Case* (1) can be treated as governing the facts of this case, I can only say that I respectfully dissent from the decision. I cannot regard *Reeves' Case* (2) as a decision at all, though in its facts it more resembles the present. Take the facts of the present case. The weir was found to be injurious to navigation; it affected coast traffic. The case is sent back to see if any partial abatement or alteration will affect the result, and the Commissioners find—No, it must always be, what we have declared it, an injury to navigation and a nuisance, and then there is a final decision of the Queen's Bench, proceeding upon that assumption. What is said to alter the case? The traffic does not at present go always in the same volume, or different kind of boats are used, and so the weir is to be re-erected, and alternate prostrations and erections are to depend upon the humour of the navigators, or the accident of the existence of a market which would attract traffic. These are all matters extern to the structure itself, which will remain a constant cause, though the effects may be varying or intermittent. I cannot think this is the finality the statute aimed at. The existing tribunal of Inspectors might on precisely the same facts as those of 1864 arrive at a contrary conclusion, but that is reversing a decision which the Act says shall be final.

In my opinion the Commissioners and the Queen's Bench, on a matter within the jurisdiction of each, arrived at a final conclusion, after giving an opportunity of remedying the mischief, which was found to be impossible by the tribunal charged with the jurisdiction of deciding this point also.

On the merits I think this fixed net was lawfully condemned and lawfully prostrated and the orders in that behalf are final and conclusive. The appeal will be dismissed with costs.

(1) Fishery Cases, June 17, 1871. (2) 20 L. R. Ir. 155.

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PALLES, C. B.:—

Of the three branches of the application to the Queen's Bench Division, one has not been argued here, I mean the portion which seeks an order commanding the Inspectors to issue a certificate authorizing the re-erection of the fixed net formerly condemned. This branch, therefore, may be left out of consideration. Another portion of the application, viz. the third branch, may be disposed of in a few words. It seeks that the special case may be relisted for hearing as not having been finally disposed of by the order of the 16th November, 1864. This Court, however, has no jurisdiction to determine whether that order did or did not finally dispose of the case. The statute 26 & 27 Vict. c. 114, s. 14, sub-s. 13, enacts that the decision of the Court of Queen's Bench shall, unless the Court otherwise directs, be final. These words, according to our decision in *Harvey* v. *Copeland* (1), exclude the jurisdiction of this Court.

There remains the second branch, viz., so much of the application as seeks a *mandamus* to the Inspectors to hold an inquiry into the right and title of the appellant to erect and use a fixed net on the site in question.

Two matters are relied upon in answer to this part of the application; 1, that the right to a *mandamus* in such a case is taken away by statute: 2, that even were there jurisdiction to issue a *mandamus*, the appellant has not shown any right to the writ.

The jurisdiction of the Commissioners to hold the inquiry is under the sixth sect. of the 26 & 27 Vict. c. 114. "Where any fixed net . . . is in use at the time of the passing of this Act, and any person claims to have erected the same in pursuance of the Act 5 & 6 Vict. c. 106, the Commissioners may, on proof being given to their satisfaction that such fixed net has been erected in pursuance of the said provisions, certify to that effect." The 40th section, however, enacts, "that the Commissioners shall not be required by writ of *mandamus*, or any writ of a like nature, to do any act or take any proceeding under this Act," and I think it clear that, if the matter rested upon that statute alone, there

(1) 30 L. R. Ir. 423.

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would not be jurisdiction to issue the writ. The question, however, assumes a different aspect, having regard to the Act of 1869 (32 & 33 Vict. c. 33). The 16th sect. of that Act imposes a penalty upon any person who shall fish with, make use of, or erect any fixed engine for the capture of salmon without having obtained a certificate, either from the Special Commissioners under the Act of 1863, or from the Inspectors acting in execution of the Act of 1869, in whom the powers of the Special Commissioners had become vested. The effect of this section is that, where the Inspectors on the application of a person who, if he obtained a certificate, would be entitled to erect a fixed net, refused to inquire whether it had been erected in pursuance of the 5 & 6 Vict. c. 106, and if they were not by law compellable to inquire, such person would, by the mere omission of the tribunal, be unable to exercise his legal right; and for that reason I think it clear that, if the Act of 1869 had stood alone, that is, were it not to be construed with that of 1863 as one Act, sect. 16 would have created a public duty in the Inspectors to inquire (upon the application of the owner of a fixed net legally erected in the open season of 1862) whether it had been erected in pursuance of the statute of 1842. The difficulty, however, is that section 20 of the Act of 1869 directs that the Act of 1863 shall be incorporated with it, and that both shall be construed together as one Act, "except where the provisions thereof are altered by this Act, or are repugnant thereto." Unless, therefore, sect. 16 of the Act of 1869 can be deemed to have altered sect. 40 of the earlier Act, or is repugnant to it, a *mandamus* cannot issue. Are these sections, or are they not, repugnant? This appears to me to be a question of some difficulty, and it is one upon which I have not formed a definite opinion. Having regard to the principle that we ought not to give to general words a construction which would injuriously affect private rights without compensation, I am not clear that they must not be regarded as repugnant. If they stand together, their joint effect would appear to be to allow the exercise of the rights of property of one person to depend upon the whim or caprice of another. There was nothing contrary to natural justice in the application of sect. 40 to every duty created by the earlier Act. An omission by the Special Commissioners

to exercise their powers under that Act could not prejudicially affect any theretofore existing private right. A certificate under sect. 6 would be beneficial to a net owner, as it had a certain conclusive effect in evidence, but its absence could not prevent his exercise of any legal right of fishing he might have; and whilst the Legislature conferred upon the Special Commissioners the power of giving him a certificate, they might well provide that they should not be compellable to do so. In the view, however, which I take of the other matters in the case, I do not think it necessary to determine this question. The House of Lords have held, in *Steers* v. *Rogers* (1), that they are at liberty to dismiss an appeal upon its merits, without determining the preliminary question whether they have jurisdiction to hear it. This principle applies in the present case. I have less difficulty in determining the merits than the preliminary point; and, what I have said upon that latter point will be understood as only indicating the reasons why I enter upon the merits rather than as expressing a concluded opinion.

Upon the merits two questions were argued—1, that the net was within section 4 of the Act of 1863, as it was "not legally erected during the open season of 1862"; 2, that the adjudication by the Queen's Bench of the 16th November, 1864, was a conclusive adjudication *in rem*, which estopped the appellant from insisting that a legal net can be now erected upon the site in question. A decision in the affirmative on either of these questions is sufficient to determine the appeal. I prefer to rest my judgment upon the first ground. It appears to me to be the broader one, and to rest more than the other, upon matter of pure right, unembarrassed by technical questions of procedure. Further, I have some difficulty in holding the order of the 16th November, 1864, to be an adjudication that the net was illegal in the open season of 1862. It is a partial affirmance of the order of the Commissioners, and that order declares that this net *is* illegal, not that it is, and *in the season of 1862* was, illegal. I am unable to hold that the special case which finds that the net was illegal in 1862, but which is not incorporated in or referred to by the order,

(1) [1893] App. Cas. 232.

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can extend or alter the period to which the adjudication upon its face refers, and thus in my mind the effect of the adjudication as an estoppel depends not on section 4 of the Act of 1863, but on the prior Act 13 & 14, Vict. c. 88, section 17, a section upon the effect of which I have not thought it necessary to arrive at a concluded opinion, having regard to the decision in reference to it of the Queen's Bench in *Moore-Smyth* v. *The Duke of Devonshire* (1), a decision which I do not desire to criticize more than is absolutely necessary for the determination of the appeal. I am not, however, to be understood as *dissenting* from the view of the Lord Chancellor as to the scope of this section. I leave its construction undetermined as (having regard to my opinion on the first question) it does not arise in the case. I then rest my judgment on the net being one which was "not legally erected in the open season of 1862," and therefore one, the right to which (if any ever existed) was extinguished by sect. 4 of the Act of 1863, and I proceed to state my reasons for arriving at that conclusion. In the first place, I hold that the order of the 16th November, 1864, was an adjudication by the Queen's Bench that not only the net in its entirety, but also *every part of it*, was, at the time of the inquiry, illegal. I so regard it, because it appears upon its face that, on the 22nd February, 1864, that Court had referred back the case to the special Commissioners to report whether, in their judgment, a partial abatement or alteration of the net would be sufficient to remove the injury to navigation and that the order was made upon the report of the Commissioners that, in their judgment, a partial abatement or alteration would not be sufficient for that purpose. I lay stress upon this, as I entirely concur in the many decisions of the Queen's Bench that where part only of a net is illegal, as injurious to navigation, that part only may be abated. Where one has a right to erect a net of a certain length, which, if confined to that length, would not be injurious to navigation, and he erects a longer one, the principle of law is that his legal right is not extinguished by the mere excess. The excess, and not the entirety, is that which is illegal at Common Law; and I see no difficulty in construing "net," in section 4, distributively, so as to include any part of it, an expression

(1) Fishery Cases, 1871.

which is to be found in 8 & 9 Vict. c. 108, section 3, and in other sections of our fishery code.

In the next place the case of the appellant is not that at the time of the inquiry the net was not injurious to navigation, or that any partial abatement or alteration of it would, at that time, have been sufficient to remove the injury; but it is that the traffic of boats through the estuary has so changed since the time of the inquiry, that the net, although then injurious to navigation, has since ceased to be so. It is no part of his case that the net, as it existed in 1863, was not the same net as that which was erected and in use during the open season of 1862, nor is it alleged that it was not in fact injurious to navigation at that time. The *onus* of proof that it was not so, were this his case, lay on the appellant, as a fixed net is against common right. In this state of facts, in the absence of allegation or proof to the contrary, I arrive at the conclusion that the fixed net, and every part of it, was injurious to navigation during the open season of 1862; and the question then arises was it "legally erected during the open season of 1862," within section 4, of the Act of 1863? If it were not, it cannot be used now.

Upon this question the decision of the Queen's Bench in *Moore-Smyth* v. *The Duke of Devonshire* (1), has been relied upon by the appellant, a decision pronounced nearly a quarter of a century since, and uniformly acted upon since that time.

I fully recognize the inconvenience of declining, at such an interval of time, to follow the considered, although not the unanimous, decision of that high tribunal, but were it necessary to do so, the decision of the House of Lords in "*The Sara*" (2) leaves us no alternative. I say, "were it necessary to do so," as the grounds of my judgment here are not antagonistic to the actual *decision* of the Queen's Bench, although I admit that they are against one of the reasons on which some of the Judges arrived at their conclusion. The *decision* there was, that an order condemning the net as injurious to navigation was not an estoppel. That order however, like that in the present case, did not refer in terms to the open season of 1862, and basing my judgment, as I

(1) Fishery Cases, 1871. (2) 14 App. Cas. 209.

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do, on matters outside the adjudication, I, in substance, give effect to that decision.

Coming then to the question of mere construction, my opinion upon the question is in accordance with that of Lord Fitz Gerald in *Moore-Smyth* v. *The Duke of Devonshire* (1), and that of Gibson, J., in the present case. I hold that the words in section 4, "not legally erected in the open season of 1862" include all classes of illegal nets, as well those illegal by reason of their being injurious to navigation, as those erected by persons other than those specified in 5 & 6 Vict. c. 106, as entitled to exercise the right of erection. It cannot be denied that this is the *prima facie* meaning of the words. A net cannot be erected "legally," using that word in its ordinary sense, if it be injurious to navigation. Again, in three other sections of the statute, "illegal" is used in its general sense, and is applied to nets as indicating their character of illegality, by reason either of their being either injurious to navigation, or otherwise. I refer to sections 6, 13, and 35. By section 6, a certificate is not to "render any net legal that would be otherwise illegal by reason of its being injurious to navigation." By section 13, the Commissioners are directed, before removing any illegal fixed net, to take certain proceedings as to summoning the parties interested, and hearing such parties, and any evidence they may produce. "Illegal" fixed nets, as used here, must comprise any nets which the special Commissioners might remove under section 5, a section which expressly mentions those injurious to navigation. The same observation applies to section 35, which enacts that the warrant for the removal of any "illegal net" shall be signed by at least two Commissioners. There are also several sections which show that kindred words such as "legality" and "legal" are used in their general sense, and do not exclude the element of injury to navigation. For instance, section 7 enacts that the Commissioners shall inquire into the *legality* of all fishing weirs, and shall remove such as are in contravention of any Act of Parliament or law in force in Ireland. It cannot be contended that a weir illegal, only by reason of its being injurious to navigation, was not liable to be removed under this section, and

(1) Fishery Cases, 1871.

innumerable orders condemning weirs on this ground have been affirmed by the Queen's Bench. Section 46 enacts that "nothing in this Act contained shall render *legal* or be deemed to recognise as *legal*, or to confer any title on any person in respect of any fixed net or fishing weir that is in contravention of any Act of Parliament or of the Common Law in force in Ireland."

As against this general meaning of "legal" and kindred expressions throughout the Act only one section (s. 5) has been referred to as indicating an intention that any of those expressions are used in a limited sense. I am unable to concur in the argument that even in that one section "legality" or "illegality" is used in any restricted sense. That section confers two separate jurisdictions upon the Commissioners. They are directed, in the first place, to "abate and remove all fixed nets . . . that are in their judgment injurious to navigation"; and, secondly, they are to "inquire into the legality of, and if satisfied of their illegality remove, all such other fixed nets . . . as are in contravention of any Act of Parliament or law in force in Ireland." The consideration of injury to navigation is excluded, as to this second class, not by reason of the word "legality" being used in a sense which excludes such injury, but because that word, although used in its general sense, is applied to nets which, *ex hypothesi*, are not injurious to navigation. The limited nature of the inquiry arises, not from any restriction in the meaning of "legality," but from the subject-matter to which it is applied. Indeed, the use of "other," as applicable to fixed nets in contravention of any Act of Parliament or law, shows that in this very section the legislature recognised nets injurious to navigation as being in contravention of law, and therefore illegal.

All these sections concur, in my opinion, in showing that if we regard the words of the Act alone, "legally," in sect. 4, must be read in its general sense. Neither can I find anything in the general policy of the Act which would justify us in adopting, whilst there is much in that policy which tends to the rejection of, the restricted meaning suggested. One of the objects of sect. 4 was to fix a time, after which no one was to be entitled to exercise the rights conferred by sections 18 and 19 of 5 & 6 Vict. c. 106. But this object would have been effected had

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"legally" been omitted, and had the prohibition been limited to nets "not erected in the open season of 1862." The introduction of this word "legally," to my mind, indicates the intention of the legislature that a net owner should not, by reason only of his having used at the time in question an illegal net, and thus having been guilty of an offence against the fishery laws, be in a better position than he would otherwise have been. His title was not to rest upon his own illegal act. This reason, however, applies with equal force to nets illegal by reason of being injurious to navigation, as to those which were illegal for any other reason.

Both the policy and the language of the statute thus lead to reading "legally" in its ordinary sense.

The last argument was that, although this result might be arrived at, were the statute read *per se* and without reference to previous legislation, those prior Acts necessitate the more limited construction. Those prior Acts have been so fully referred to by the Lord Chancellor that it is unnecessary for me to travel through them in detail. It is sufficient to say that, when all are examined, there is but one section which can be relied upon as giving any colour to the argument. I refer to sect. 3 of the 8 & 9 Vict. c. 108, which contains in reference to nets the expression "illegally erected." It is said that this section upon its true construction is conversant only with nets illegal for reasons other than being injurious to navigation; that therefore "illegally erected" here means erected under circumstances which render them illegal for reasons unconnected with injury to navigation, and that "not legally erected" in the section of a subsequent Act, *in pari materiâ*, should be construed in the same sense. I do not think it necessary to hold that the true construction of this section is not that contended for, especially as I believe that for many years that construction has been adopted by the Queen's Bench. But, even assuming, without deciding, that that limited construction is the true one, I am of opinion that the limitation arises, not from the sense in which "illegally erected" is used, but from the subject-matter to which the expression is applied. The words are, "And whereas . . . fixed nets . . . are in many instances erected and used in places pro-

hibited by the said recited Act *by parties who have no title so to do;* and it is expedient . . . that the Commissioners should have power to suspend the use of *such* . . . nets . . . in all cases where it shall appear to them that *the same*, or any part thereof, are illegally erected." The provision, therefore, is not to remove all nets illegally erected, but a particular class of nets, which *ex hypothesi* exclude those injurious to navigation. Furthermore, even were that expression used in a limited sense in a part of the code dealing with a particular class of nets, it would not, in my opinion, afford any reason for reading it in the same limited sense in a later Act, which dealt, not with that particular class of illegal fixed nets, but with all illegal fixed nets.

I am therefore of opinion that nets "not legally erected," in sect. 4, include nets illegal by reason of being injurious to navigation, and that as the net of the appellant is within that description, his title thereto was extinguished by the statute.

For these reasons, I concur in the opinion arrived at by the Lord Chancellor that the appeal should be dismissed with costs.

FITZGIBBON, L. J.:—

The only point upon which I possibly differ from the Chief Baron is as to which ground of our decision is the broader. I desire to rest my judgment on the decision of the Commissioners as having been a final adjudication. But if it were *res integra*, I should have had no doubt that a net could not be "legally erected" within the meaning of the Act of 1863, sect. 4, if it was injurious to navigation. As to the third part of the motion, namely, the application to reinstate the appeal or case stated for further hearing by the Queen's Bench, I have nothing to add, and I do not think it necessary to lay down that in no case will *mandamus* lie to the Inspectors of Fisheries, or to discuss the subtle distinctions between *mandamus* and *certiorari*. I come to what seems to me to be a clear and plain ground, upon which the relief asked must be refused. Fixed nets in tidal waters are contrary to Magna Charta and to common right, and unless a title is proved going behind Magna Charta, or a subsequent erection is shown to be legal under the Fishery Acts, every such net is *prima facie* illegal.

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What then was the jurisdiction, and what were the duties of the Commissioners under the Act of 1863, and when they had exercised that jurisdiction and discharged those duties, did anything remain open? It appears to me that, before applying sect. 4, we must see what was the jurisdiction under sect. 5, which, in my opinion, is the leading enactment. Section 5 provides that "subject to . . . appeal . . . the Commissioners . . . shall abate and remove *all fixed nets* erected or used for catching salmon or trout in Ireland that are *in their judgment injurious to navigation*." There is no exception to this condemnation. They are also to "inquire into the legality of, and if satisfied of their illegality remove, all such *other* fixed nets erected or used as aforesaid as are in contravention of any Act of Parliament or law in force in Ireland." The temporary and special constitution of the Commissioners seems to me to show that these powers were to be exercised once and for all, and therefore necessarily upon the facts as they existed at the time. Section 37 provides: "The offices of the said Commissioners . . . shall continue in force for two years only, and from thenceforth until the end of the next session of Parliament." How could it have been intended that a finding that a net was injurious to navigation should be reopened on a change of circumstances occurring after the Commissioners had ceased to exist? I hold that there was to be, once and for all, and first of all, an inquiry whether each fixed net was or was not injurious to navigation; and if the Commissioners found that it was so, there was an end of the weir for all purposes, subject only to an appeal. It was only where a net was not injurious to navigation, that the further inquiry into its legality on other grounds was to be entered upon. We know that nets held under Landed Estates Court titles were condemned as injurious to navigation. Title was immaterial to condemnation on that ground. I have tried in vain to find any meaning for the words "*other* fixed nets" except fixed nets not in the judgment of the Commissioners injurious to navigation. Therefore, I agree with the Chief Baron that there was no jurisdiction to enter upon the inquiry into title when the net was once found to be injurious to navigation. Such an inquiry was premature until the navigation question was decided, and was futile after the net was found

injurious. That being so, I think it material to see what the net was with which we have to deal. The special case states that the net in 1862 projected 662 yards, and in 1863 it projected 814 yards—say half a mile. The space occupied by the net, and adjoining it, had been sailing ground for smacks, yawls, and hobblers, which were driven out of their natural course and forced into the deep channel, and instances were given in which the weir had been struck against by boats and a lighter, to their damage, and to the peril of their crews. The Commissioners saw the net, and found that its position rendered the navigation of lighters inconvenient and dangerous, and they found that during the open seasons of 1862 and 1863 it was injurious to navigation, both within 5 & 6 Vict. c. 106, sect. 21, and also within 26 & 27 Vict. c. 114, sect. 5. They therefore found that even under the Act of 1842, it was not legally erected. The case was sent back to the Commissioners for the purpose of finding whether the illegality could or could not be removed, and their ultimate decision is in these words: "Pursuant to your Lordships order in this case, bearing date the 22nd February, 1864, we, the Special Commissioners of Irish Fisheries, beg to report that we have considered the evidence given to us in the said case, and that in our judgment a partial abatement or alteration of the said weir would not be sufficient to remove the injury caused by it to navigation."

I take it, as the Chief Baron has put it, that this is a finding by the Commissioners that, in their judgment, this weir, *and every part of it,* was injurious to navigation, and if such a judgment under sect. 5 can be in any case final, it is so in this case. I think it was conclusive at the time as to the whole of the net, and that there was, thereupon, an end to the proceeding, and nothing remained but to abate and remove the net, which was done. That is the ground on which I rest my judgment: namely, on the decision of the Commissioners as a complete and final adjudication, ending the net and the proceedings. Let me ask how the question under sect. 4 could arise in such a case? In procedure, the question of navigation was to be first settled, and if it resulted in a finding of injury to navigation at the time of the inquiry in 1863, 1864, or 1865, the legality of the erection in 1862 could

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not save the net. Therefore, while I agree with every other member of the Court that it never occurred to the Legislature that the injury to navigation could be a fluctuating thing, nor that it could cease through a change of the navigation, it seems to me that such a change could never become a subject for consideration, and that the question of legality under section 4 was necessarily confined to cases of title in 1862, where injury to navigation at a later date had been disproved.

To see the meaning of section 4, I go back to what I have already said—that the erection of any fixed net after Magna Charta was *prima facie* illegal. But between Magna Charta and the year 1842, a number of nets had been put up. The Act of 1842 was passed to legalize such nets under certain conditions, and the Act of 1845 went further in the same direction. But in no case was any fixed net legalized that was injurious or detrimental to navigation. No net could be legally erected under those Acts if it was injurious to navigation. But sect. 4 of the Act of 1863 was intended to stop the exercise of the power of legally erecting nets under the older Acts, from and after the open season of 1862. It was passed to prevent the acquisition of legal nets by people who might have made a rush to put up new nets, when the Act of 1863 was impending. In other words, it fixed 1862 as the last date at which the powers of erecting nets under the Acts of 1842, 1845, and 1850, could be exercised. That being so, the effect of the two sections together was that every net was to be abated which was injurious to navigation at the date of the inquiry, or which had not been legally erected in 1862, and the Commissioners were bound to inquire into both points, and their judgment upon each or either, if adverse, was final, and fatal to the net.

Now to what extent have the decisions of the Queen's Bench gone counter to this principle? I should be slow to question decisions, or to alter a practice, after so many years. But I want to point out what the decisions were, as distinguished from mere *dicta*. As to *Moore-Smyth's Case* (1) the report is unauthorised and in many respects incorrect, but it appears plainly enough that the Queen's Bench never thought of doing more than giving the

(1) Fishery Cases, 1871.

appellant the opportunity of trying whether he could get rid of the injury to navigation, without removing the weir altogether. Mr. Justice George mentions a number of previous cases which the Court had sent back to the Commissioners to say whether there could be an abatement of the nuisance, and he says that in a great variety of cases changes had been made in the weirs, whereby they ceased to be injurious to navigation. At first, the Commissioners had condemned the nets in general terms. When these orders came up, they were held bad in law, or if sent up on special cases, they were sent back with directions to state the grounds of condemnation. When they came up again, with general findings that the nets were injurious to navigation, the Court of Queen's Bench sent them back a second time to see whether the injury to navigation could not be obviated by an alteration or shortening of the weir. The principle on which this was done is stated by George, J., O'Brien, J., and Whiteside, C.J., in *Moore-Smyth's Case* (1), namely, that a man who has a legal right is not to lose it altogether by an excessive exercise of it. Whiteside, C. J., held that the order, which had been previously made in that case, condemning the weir generally, was not a bar to the further investigation as to the legality of part of it. He refers to *Williams* v. *Boyd* (2), before the Common Pleas. "In that case, Monahan, C.J., said (p. 458), 'It would be a very narrow construction of the Act to hold that no alteration or improvement can be made in the now legally existing fixed nets. It occurs to me that they can be improved and altered, without destroying their identity as fixed nets.'" A structure, 800 yards long, may be injurious to navigation, but it is quite possible that only the last 200 yards do any mischief, and what the Court really said in *Moore-Smyth's Case* (1) was this—"We will send it back to the Commissioners to inquire whether the whole of this weir, or only part of it, is injurious to navigation." On the second inquiry, the Commissioners found that the shortened weir was not injurious, but the case had to go back again, because, as George, J., said, "There had been an incomplete inquiry," and "no complete report had been made," as it should have

(1) Fishery Cases, 1871. (2) Ir. R. 3 C. L. 450.

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been, "upon both the branches of inquiry, namely, as to whether Mr. Smyth had a title under the Act, and as to whether the weir was injurious to navigation or not." O'Brien, J., clearly shows that the only alteration which he contemplated was a removal of an injurious, and therefore illegal, part of a weir, leaving the remainder legal in 1862, and legal at the time of the further inquiry. He says—"It was well known that the provision of the 4th section was introduced to prevent parties from acquiring a new right by a new weir in 1862; but it was sought to be carried to the extent that if the structure was illegal in 1862 the party lost all right to his weir. We have got rid of that stringent construction, and, when the illegality consists in the weir being injurious to navigation, if that injury can be removed by a partial abatement of the weir, such an order can be made. . . . According to our decisions, if, *in 1862*, a weir was illegal in consequence of its projecting some feet into the river, so as to interfere with navigation, it would be rendered perfectly legal by the removal of a certain portion of the structure."

The question of legalizing a weir at a subsequent time, which was wholly illegal in 1862, never entered into the mind of the Court at all. All that the Queen's Bench did was to give Mr. Moore-Smyth a chance of showing that part of his weir was legal, and if he had failed to do so on the further inquiry, as the present appellant failed, the net would have been finally and completely condemned.

There is nothing whatever in *Moore-Smyth's Case* (1) to support the present application. But then came *Reeves' Case* (1). Speaking for myself, I cannot understand how such a case is an authority at all. The Judges made no rule on the motion; they only said that the Commissioners might hold a further inquiry if they liked. They seem to have overlooked the possibility of there being a further inquiry, a finding favourable to the weir, and no appeal. The case never came back to the Queen's Bench. There was never any question of *subsequent* legality, and the reported judgments amounted to no more than a suggestion as to how the question might be raised. Even if it were otherwise, I should

(1) Fishery Cases, 1871. (2) 20 L. R. Ir. 155.

hold that fluctuations and changes in the navigation could not possibly legalize the erection, at subsequent dates, of nets which had, in the whole and in every part, been once found to be injurious, under the Act of 1863.

A distinct branch of the jurisdiction of the Commissioners was fully exercised, and the Queen's Bench gave to the applicant, in this case, all that was ever given to any applicant, namely, the chance of showing that though his weir had, in general terms, and as a whole, been found to be injurious, and therefore illegal, the injury was caused by only part of it, and the rest of it could be rendered legal by a partial removal. When he failed to do this, there was an end of the case, and a complete and final decision under sect. 5.

I test the effect of *Reeves' Case* (1) by asking—If the case had come up again to the Queen's Bench, were the Judges bound by anything that they had said to decide that, though every part of the weir had been injurious in 1864, at the date of the former inquiry, it was legal in 1886 because the navigation had ceased?

I am of opinion that the decision of the Queen's Bench should be affirmed, and the appeal dismissed with costs.

BARRY, L.J.:—

I agree that the ruling of the Queen's Bench should be affirmed, and after the learned and elaborate judgments which have been delivered, I do not intend to go over again the grounds already stated by my colleagues at any length.

The first question is the question, whether a *mandamus* lies to the Inspectors of Fisheries to rehear the case, having regard to the terms of the 40th section of the Salmon Fishery Act of 1863, which says in express terms that the Commissioners shall not "be required by writ of *mandamus* to do any act or take any proceedings under this Act, nor shall proceedings before them be removable by *certiorari*." I agree that it is a very far-reaching section. I do not think it could be ruled by the cases referred to which decide that, notwithstanding the sections taking away *certiorari*,

(1) 20 L. R. Ir. 155.

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certiorari lies. I am not aware of any statute in which a writ of *mandamus* was taken away, on which the question arose; it would be a strong thing to hold that the subject cannot exercise his right of obtaining a prerogative writ of *mandamus* for the purpose of obtaining an order that a certain thing should be done. But there is another point why a *mandamus* may still lie in this case. Section 40 of the Act of 1863 which takes away the right to a writ of *mandamus* was passed long previously to the 32 Vict. c. 9. There is no provision in that latter statute for taking away the right to a writ of *mandamus*, and it is under that statute that it is required to get from the Commissioners a certificate. It is under that statute that this application is made, and it is difficult to hold in construing statutes *in pari materia* that, where there is no repetition of provisions with regard to these matters, a section containing such an enactment is to be read in. It is, however, not necessary to give an opinion on that very large question.

As to another point, there is a diversity of opinion. The Lord Chancellor is inclined to the opinion that "not legally erected" does not apply to nets merely because they are injurious to navigation. On the other hand the Lord Chief Baron says that the 4th section does include in its enactment under the words "not legally erected" in 1862 a weir that was injurious to navigation, and for that ground illegal in 1862. Fitz Gibbon, L.J., is of that opinion, but he thinks that the ground on which he puts the case, in which I agree, is the proper one, namely, that the decision of the Commissioners is a final adjudication. The question is narrowed to this, whether there is a jurisdiction to compel the Commissioners to obey a *mandamus* from this Court to hold an inquiry into the legality of the weir which was condemned in 1864, and re-condemned by the Queen's Bench under their doctrine—a self-created and philanthropic doctrine of referring the case back again to ascertain whether by cutting a piece off the weir you could make it legal. Whether you could make the weir legal in 1862 by cutting off part of it in 1894 is a difficult proposition. I do not go through the judgment of the Queen's Bench in that case (*Moore-Smyth* v. *The Duke of Devonshire* (1)) referred to by the

(1) Fishery Cases, 1871.

Chief Baron and Fitz Gibbon, L.J. It is plain that the way in which it came before the Court of Queen's Bench is entirely different from the present case, and we have to determine in the case of a weir which came before the Court of Queen's Bench in 1864, and where the Commissioners solemnly decided that the weir was an illegal weir as injurious to navigation, and that decision has never been impeached, whether that case can now be opened, so that by an alteration the weir may be rendered legal. In short there was a solemn decision by the Commissioners, and the only decision, in 1864, deciding this to be illegal. The subsequent practice which arose of sending it back to inquire whether by shortening the weir it could not be made legal does not, in my opinion, arise here. Therefore if *Moore-Smyth's Case* (1) is to be taken as a decision that the decision of the Commissioners is not to be taken as final, I differ from it, and think it should be overruled. Then refer to *Reeves' Case* (2); as Fitz Gibbon, L.J., has pointed out, it is really not a decision at all. The Court made no rule, but they suggested that the Commissioners might adopt a philanthropic course, and hold a new inquiry, and then come back again to the Queen's Bench. But I cannot come to the conclusion when we consider what led up to this legislation that it ever entered into the mind of the Legislature that navigation was to be fluctuating in its character, and that one year it was to be decided that a weir was injurious to navigation, and that next year by a change in the channel it was not so, when the question was to be put into the hands of a tribunal specially constituted for the purpose of sweeping away these weirs injurious to navigation of rivers.

I am of opinion that the abatement in this weir directed in 1864 was final and conclusive. I think the Queen's Bench should be affirmed.

Solicitor for J. D. Coghlan: *M. D'Alton.*
Solicitor for the respondents: *S. Allingham.*

R. D. M.

(1) Fishery Cases, 1871. (2) 20 L. R. Ir. 155.

Q. B. Div.
1895.

JOHNSTON *v.* SMITH (1).

Nov. 15, 16.

Landlord and tenant—Ejectment for non-payment of rent—Statute of Limitations (3 *&* 4 *Wm* 4, *c.* 27, *sections* 2, 14; 37 *&* 38 *Vict. c.* 57)—*Acknowledgment—Proposal by tenant to purchase his holding under the Land Purchase Acts, given to solicitor having carriage in proceedings towards sale of the landlord's interest—Agent of person entitled—Effect of service of originating notice to fix fair rent, of amendment thereof by the Land Commission, and of fair rent order—Estoppel—Land Law* (*Ireland*) *Act*, 1881 (44 *&* 45 *Vict. c.* 49), *sect.* 8.

S. was tenant from year to year of M., who died in 1874. In 1881 S. served on the agent, W. M., an originating notice, directed to "the landlord, *per* W. M.," to have a fair rent fixed on his holding. By order of the Land Commission, dated 16th June, 1883, this notice was amended by naming M.'s devisees as landlords, and that Court, by order dated 29th June, 1883, fixed a judicial rent on the holding.

L., a legatee under M.'s will, having, in 1879, instituted a suit in Chancery for the administration of M.'s real and personal estate, naming M.'s devisees and others as defendants, and an order for sale having been made and the carriage given to L.'s solicitor, a proposal in writing by S. was, on the 3rd December, 1890, sent to the said solicitor for the purchase of S.'s holding under the Land Purchase Acts to be submitted to the Court (as was done).

On the 3rd June, 1895, a civil bill in ejectment for non-payment of rent was brought against S. in the name of a legal mortgagee of M.'s estate. S. had paid no rent for upwards of twelve years before action brought. On case stated by the Judge of Assize:—

Held, that the proposal to purchase was an acknowledgment of title within 3 & 4 Wm. 4, c. 27, s. 14, and that the solicitor having carriage was an agent within the meaning of that section to receive it.

Per O'Brien, J., that the acknowledgment given in the originating notice in 1881 must, when that notice was amended and acted on by the defendant in 1883, be taken to be an acknowledgment given in 1883, and further, that the fair rent order created a new starting point for the Statute of Limitations.

Case Stated, pursuant to 27 & 28 Vict. c. 81, s. 35, for the opinion of the Queen's Bench Division, by Mr. Justice Johnson at the Co. Fermanagh Summer Assizes, 1895, on the trial of an

(1) Before O'Brien, Holmes, and Gibson, JJ.

appeal from a dismiss by his Honor the County Court Judge of Fermanagh of a civil bill ejectment for nonpayment of rent. The case stated was to the following effect:—

The civil bill was issued and served on the defendant on the 3rd June, 1895.

Previous to and at the time of his death in November, 1874, John Martin Moorhead was owner of (amongst other lands) the holding of land mentioned in the civil bill ejectment, and the defendant John Smith, was his tenant from year to year of the same, at the yearly rent of £10 10*s*. The plaintiff, William Johnston, was a judgment mortgagee of the estate of said J. M. Moorhead.

J. M. Moorhead died in November, 1874, having by his will absolutely devised all the said lands to his three sons, James, Joseph, and Robert Moorhead, charged with certain pecuniary legacies.

In 1879 Elizabeth Lough (a legatee under the will of said J. M. Moorhead, whose legacy was charged on the said lands) with her husband instituted an action in the Rolls Court against said James, Joseph, and Robert Moorhead, and others, for the administration of the real and personal estate of said J. M. Moorhead.

On the 31st October, 1881, John Smith served an originating notice to fix a fair rent of his holding. This notice was directed "to the landlord, *per* Wm. Moorhead," who was the agent over the estate, and was entitled, "Wm. Moorhead and others," landlords; John Smith, tenant. By order of the Court of the Irish Land Commission, dated 16th June, 1883, this notice was amended by naming said James, Joseph, and Robert Moorhead, as landlords; and by order of same Court, dated 29th June, 1883, the yearly rent of said holding was fixed at £9 10*s*.

By a decree in the administration action, on further consideration, dated 15th December, 1882, said lands (including the defendant's holding) were ordered to be sold.

The plaintiff's solicitor, Mr. George Knight, of Clones, had the carriage of the sale; conditions of sale were settled at chambers, and, in the rental thereunto annexed, the tenancy of the defendant, John Smith, was described "as statutory tenant under the Land Law Act, 1881, at a fair rent of £9 10*s*., ascer-

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tained by order of the Land Commission, dated 29th of June, 1883." Mr. George Knight was appointed Clerk of the Crown and Peace for County Meath, and thereupon Mr. M. E. Knight became the solicitor for the plaintiffs in the administration action, and Mr. Henry Murphy, solicitor for said defendant John Smith and four other tenants on the property, addressed and sent to Mr. M. E. Knight (the solicitor then having carriage of said sale) a letter dated the 3rd December, 1890, enclosing proposals in writing by the defendant John Smith, and four other tenants, for the purchase under the Land Purchase Acts of their respective holdings of the lands ordered to be sold in the action, to be submitted to the Rolls Court. A list of these tenants, with the amount of purchase money offered by them respectively, was attached to the letter which was entitled in the action of *Lough* v. *Moorhead*. The defendant Smith had no holding on the Moorhead property except the land mentioned in the civil bill ejectment.

These proposals were duly submitted for approval to the Rolls Court, and, by an order in the administration action, dated 15th December, 1890, liberty was given to submit amended proposals for approval, and it was ordered that the receiver should be at liberty to take such steps as might be necessary to recover the arrears of rent due by the said tenants. No amended or other proposal for purchase was ever made by said defendant John Smith, or by any other of said tenants. During various transfers of the papers relating to this suit, occasioned by change of solicitors, the defendant's proposal was lost or mislaid, and no copy thereof was produced on the hearing of said appeal.

No rent had been paid by the defendant for the holding now sought to be recovered for more than twelve years before the issue of the civil bill.

It was contended by *Henry*, counsel for defendant, that, as no rent was paid for upwards of twelve years before action, the plaintiff's claim was barred by the Statute of Limitations, that therefore the dismiss ought to be affirmed, and that no acknowledgment signed by the defendant within the meaning of the statute had been given since the originating notice dated 31st October, 1881.

It was contended by *Wylie, Q.C.*, of counsel for the plaintiff,

that the fair rent order of 29th June, 1883, was a binding determination that there was a then existing tenancy in defendant, and that the Statute of Limitations would not bar the plaintiff's claim until twelve years from the date of that order, and further that the defendant having, as tenant of the said holding, caused his proposal for purchase of the holding under the Land Purchase Acts to be submitted for approval to the Court which had the care and management of the estate pending the administration action, and his proposal having been ruled on, and leave given to submit an amended proposal, the defendant ought not be admitted to contend that he was not tenant, as he had then represented himself to be for the purpose of obtaining the benefit and advantage of purchase; and that he had thus acknowledged plaintiff's title sufficiently to prevent the bar of the statute.

The learned Judge stated that in his opinion the plaintiff was entitled to succeed, and that he was prepared to reverse the dismiss and give a decree for possession, but, at the instance of defendant's counsel, directed the case to be stated for the opinion of the Court: the question for the Court being whether the plaintiff was entitled to recover possession.

Henry, for the defendant:—

The Statute of Limitations is a bar to the action. The originating notice might, I admit, have been an acknowledgment, but more than twelve years have elapsed between its service and the bringing of this action. The amendment of the notice cannot be construed into a new acknowledgment; there was no signature by the defendant to the amended notice, and it was not given to anyone.

The fair rent order creates no new tenancy, and gives no new starting point to the statute. Sect. 8 of the Act of 1881 (44 & 45 Vict. c. 49), provides that the tenant of a present tenancy may from time to time, "during the continuance of such tenancy," apply to the Court, &c.; and, by the same section, if the Court fixes a judicial rent, then, during the statutory term of fifteen years, "such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions." The old tenancy is thus left as it was before, the fair rent order only affixing to it a new rent and certain statutory conditions which

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are applicable during the continuance of the statutory term. [GIBSON, J.: You must not assume that the fair rent dies at the end of the fifteen years.] The statutory conditions are, I submit, only applicable for fifteen years, "if it (the present tenancy) so long continue to subsist"; after that period the old tenancy emerges free from those conditions. [O'BRIEN, J.: Do you suggest that the landlord could sue for the old rent?]

The order of the Commissioners is at most a decision that a tenancy was then subsisting, but that decision is not binding on this Court—see *Hemphill* v. *Frazer* (1), and *Bruce* v. *Steen* (2)—and the decision is quite consistent with the statute having been running in favour of the tenant for some time previous to the making of the order.

The letter of December, 1890, was not produced, and the secondary evidence did no more than show that there had been some proposal to purchase without ascertaining its terms. The proposal may have been a conditional one; if so, it would not have been sufficient: *Doe* d. *Curzon* v. *Edwards* (3). It was not given to the person entitled or his agent, but to the solicitor having carriage, who was in fact solicitor for the plaintiff, a legatee merely, and who could not be considered agent for the owners who were defendants.

John Donaldson and *Wylie, Q.C.*, for the plaintiff:—

The originating notice, which was served in 1881, would admittedly, if served within twelve years before the action, have been a sufficient acknowledgment, signed by the tenant, and given to the landlord. The order of the Land Commission in 1883 amending the notice must have been obtained on the tenant's application, and, in any event, was acted on and adopted by him. As against the three devisees of J. M. Moorhead, the proceedings could be binding only as from that date. This is the converse of *Byron* v. *Cooper* (4), where a plaintiff instituted a suit against certain defendants, and afterwards joined as defendants certain

(1) 10 L. R. Ir. 87.
(2) 14 L. R. Ir. 408.
(3) 6 M. & W. 342.
(4) 11 Cl. & F. 556.

others in whose favour the statute had meanwhile run, and where it was held that as against them the proceedings did not relate back to the date of their institution, but dated only from the time at which these persons were made parties. Apart from this, by such an amendment the originating notice must, we submit, for the present purpose at least, be taken as though it were given again and afresh on that date, time running from the date of the giving of the acknowledgment, not from the date of the signature; and independently of any amendment, the originatnating notice should be treated as a continuing acknowledgment of the landlord's title, acted on and adopted throughout by the tenant, down to and at the hearing of the application to the Land Commission and the fixing of the fair rent.

Further, the fair rent order itself is a sufficient acknowledgment; it involves an admission by the tenant that the relation of landlord and tenant exists between the parties, and the decision is founded on that admission: see *Hemphill* v. *Frazer* (1) and *Bruce* v. *Steen* (2); and, even if the old tenancy and certain of the former rights of landlord and tenant, *inter se*, still continue—*O'Connor* v. *Smith* (3), *Knox* v. *Baxter* (4)—nevertheless the order creates afresh and expressly a statutory liability on the tenant's part to pay the rent then fixed, introduces new relations and conditions between the parties, alters the incidence of liability in some cases (*Sturgess* v. *Ryan* (5)), and must be taken to give a new point of departure for the statute. In other words the plaintiff's title accrued at the date of the fair rent order. In *Pugh* v. *Heath* (6), a mortgagee, under a mortgage dated 1856, who had brought a foreclosure bill in 1871, and had obtained a decree absolute in 1877, brought an ejectment in 1878, and it was held that though there had been no payment of principal or interest to him at any time, this was no answer to the ejectment, as his title accrued in 1877. So a *scire facias* on a judgment was held not a mere continuation of a former suit, but as creating a new right: *Farrell* v. *Gleeson* (7); and so in *Irish Land*

(1) 10 L. R. Ir. 87.
(2) 14 L. R. Ir. 408.
(3) 20 L. R. Ir. 393.
(4) 19 L. R. Ir. 460, 473.
(5) 24 L. R. Ir. 305.
(6) 7 App. Cas. 235.
(7) 11 Cl. & F. 702.

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Commission v. *Junkin* (1), it was held that a civil bill decree for arrears of tithe rentcharge, though unsatisfied, afforded a new starting point for the statute.

The proposal to purchase, contained in the letter of 3rd December, 1890, which was signed by the defendant, was a sufficient acknowledgment. The learned Judge found, as a fact, on the secondary evidence, that the proposal was made under the Land Purchase Acts, and this necessarily involves an acknowledgment of the existence of the relation of landlord and tenant, and of the landlord's title. An admission contained in an answer in a Chancery suit, *Blair* v. *Nugent* (2), *Good* v. *Job* (3), an admission of debt by an insolvent in his schedule, *Barrett* v. *Birmingham* (4), an acknowledgment of a debt in the debtor's will, *Millington* v. *Thompson* (5) (referred to in *Scott* v. *Synge* (6)), an admission of the existence of a charge contained in an owner's petition to the Landed Estates Court, *Re West's Estate* (7), have all been held to be a sufficient answer to the plea of the statute; see also *Tristram* v. *Harte* (8). This proposal was made and signed by the defendant, and was sent to the solicitor having carriage of the proceedings, who represented all the parties to the suit and also the Court, and thus it satisfied the provision that the acknowledgment must be given to the person entitled, or the agent of the person entitled. In *Blair* v. *Nugent* (2), Lord St. Leonards held that "an acknowledgment, if made in a schedule, affidavit, or answer is sufficient, although it may be said that in those cases it is made to the Court and not to the party."

Henry, in reply.

[Reference was also made during the argument to the following—*Taaffe's Estate* (9), *Slacke* v. *Duffy* (10), *Slacke's Estate* (11).]

(1) 24 L. R. Ir. 40.
(2) 3 J. & Lat. 673.
(3) 1 E. & E. 6.
(4) 4 Ir. Eq. R. 537.
(5) 3 Ir. Ch. R. 236.
(6) 27 L. R. Ir. 570.
(7) 3 L. R. Ir. 77.
(8) 1 L. & T. 186.
(9) 1 L. R. Ir. 370.
(10) Unreported.
(11) Unreported on this point.

O'BRIEN, J. :—

This case has been stated by Mr. Justice Johnson for our consideration, and involves a question of novelty and importance. The action was one of ejectment for nonpayment of rent, brought in respect of lands, which the tenant now alleges in effect to be his absolute property, and the facts afford a good illustration of a state of things not uncommon in this country, for the tenant has apparently contrived to evade paying any rent for upwards of twenty years. Notwithstanding the immunity which he has so long enjoyed, and perhaps fearing that after all the law might find means to reach him, he sought, in 1881, to protect himself by serving, in the Court of the Land Commission, an originating notice to have a fair rent fixed on his holding. The case came on for hearing in 1883, when, presumably on the application of the tenant, the notice was amended by inserting the names of the former owner's devisees as landlords, and a fair rent was fixed. The Act of Parliament under which this order was made is in so many respects opposed to and subversive of one's ideas of the rules of the common law that it is often difficult to apply the ordinary principles of construction to its interpretation. In the result, however, the rent was reduced, and the tenant could not therefore be disturbed, as long as he paid that reduced rent. Certain other characteristics were imported into the tenancy, and, in some respects at any rate the former relations of landlord and tenant underwent modification, though the original tenancy, as such, still continued to subsist. Notwithstanding all this, the tenant did not pay any rent; but he took a new departure, for, in 1890, he made a proposal in the Court of Chancery, in which Court the estate on which this holding stood was being administered, to purchase that which he now seeks to maintain is his own property. It is repugnant to common sense that, under these circumstances, a man should endeavour to purchase property of which he was at the time, according to his present contention, absolute owner, unless there is some strong warrant in law for such a course. I am of opinion that there is no such warrant.

The originating notice given by him to the landlord was, in my opinion, an acknowledgment by him of his tenancy. Since the date of the service of that notice he might have acquired a

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title by lapse of time, but the rectification or amendment of that notice took place within twelve years before the issue of the civil bill; and, although I have had some difficulty in arriving at a conclusion upon this point, I am of opinion that the originating notice, made in 1881, and amended and used in 1883, must be taken, for the purposes of the case before us, to have been made in 1883. If a person signs a document, and, at some later time, just as if it were actually present and referred to, makes use of it again, I take it that it is the same as if a fresh signature were expressly made to it by him. In this case the notice was amended, was used, and an order fixing a fair rent was made thereon in 1883; it was adopted by the Court of the Land Commission, and was the foundation of their jurisdiction.

I think further that the application to purchase was a sufficient acknowledgment. It is conceded that a proposal to a receiver under the Court would be an acknowledgment within the statute. The action in the Rolls Court was for the administration of real and personal estate; all powers of management were vested in the Court; the owner or owners had no control over any proceedings after a sale had been decreed. There must be some person in existence capable of receiving an acknowledgment that might satisfy the statute. Who then was the proper person to whom an acknowledgment could be given? Could it be any other person than the Court itself or some officer designated by the Court? Such an officer was the solicitor having carriage of the proceedings which might require a sale; he was acting under the Court, and on behalf of all parties interested, and I can entertain no doubt upon the evidence that a proposal had been put in signed by the defendant himself, and that it was given to a person who filled the character of agent for the owners.

A larger question, and one of wider importance, presents itself in the consideration of this case, namely, how far proceedings, taken under a system in its nature revolutionary and subversive of our ideas of contract in relation to land, can affect the relations of landlord and tenant in this connexion. Notwithstanding the decision in *Hemphill* v. *Frazer* (1), from which I do not wish to express any dissent on this occasion, for it is distinguishable from

(1) 10 L. R. Ir. 87.

the present case, I must state my opinion, that where a person serves an originating notice and so obtains an order, made by the authority he has himself set in motion, fixing a fair rent on his holding, that order, as against him, establishes conclusively the relation of landlord and tenant, behind which he cannot go. I have therefore come to the conclusion that the learned Judge was right in his decision to grant a decree for possession.

HOLMES, J.:—

If it were necessary to decide this case upon either of the two first points that have been argued, I would require more time for consideration; but as I entertain no doubt about the third point, I do not wish to put the parties to the expense of an adjournment. It will, however, be understood that I offer no opinion as to the effect of the amendment of the originating notice, or of the order fixing the fair rent.

The ground of my judgment is that the plaintiff is entitled to succeed by reason of the proposal to purchase. It is admitted that this proposal was an acknowledgment of title sufficient to prevent the operation of the Statute of Limitations, provided it was made to the agent of the landlord. I have no doubt that it was so made. A suit was instituted in the Chancery Division in which the three co-owners of the lands were defendants; and in the course of the suit an order was made directing the lands to be sold. A solicitor was appointed by the Master of the Rolls to have carriage of the sale, and thereupon it became his duty to do what was necessary for this purpose. It was part of his duty to receive proposals to purchase, and to submit them to the Court. In taking these steps he must be regarded as acting on behalf of all the parties to the action; and I have therefore no hesitation in holding that the proposal sent to him by the defendant was a proposal sent to a person who for the purpose of receiving and dealing with it, was the agent of the owners.

GIBSON, J.:—

There is nothing to show that the proposal was conditional, and I think that the question is really whether the acknowledgment

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was given to the right person. I dissent from the view pressed by Mr. Henry in his argument on that point, being of opinion that the solicitor having carriage was an agent within the statute, and that the proposal to purchase was a sufficient acknowledgment. The agent to receive an admission is not the same as an agent to admit liability. On the other points I prefer to express no final opinion, though I incline to think that, when the original notice was amended on which the fair rent order was obtained, there was a fresh acknowledgment made to the new parties, and that the amended notice must be taken to be a re-delivery of the original signed notice which counsel admits was a sufficient acknowledgment: see *Stewart* v. *Eddowes* (1).

As to the effect of the fair rent order, without dissenting from the view of my brother O'Brien, I would not decide the point without further consideration. It may be that the Land Commission order varies an existing right, but does not create a new one. I think in this case, where the relation of landlord and tenant existed, the order obtained on the tenant's application created an estoppel against him. Whether this estoppel is efficacious in preventing the bar of the statute may be a matter of discussion, but I should be unwilling to hold it is not.

Solicitor for the defendant: *H. Murphy.*
Solicitor for the plaintiff: *W. A. Parke.*

A. E. R. J.

(1) L. R. 9 C. P. 311.

MASSY WESTROPP *v.* COMMISSIONERS OF PUBLIC WORKS IN IRELAND (1).

Q. B. Div. 1895. June 10, 11, 12, 29.

Salmon Fisheries (Ireland) Acts, 1842, 1863 (5 & 6 *Vict. c.* 106, *s.* 41; 26 & 27 *Vict. c.* 114, *ss.* 9 *and* 12)—*Eel weir—Salmon weir—Free gap—Weir not extending more than half way across a river—Implied repeal of statute—Repeal by Statute Law Revision—Interpretation of Statute Law.*

The respondents were owners of two eel weirs in the Shannon, which, in 1863, and since that year, had been without a free gap. It was admitted that neither weir extended more than half way across the river. In a prosecution before Justices under section 12, sub-section 1, of the Salmon Fisheries (Ireland) Act, 1863, for not making a free gap therein "within twelve months after the commencement of this Act" of 1863, the Justices dismissed the complaint on the ground that the offence under this sub-section was not a continuing one, and that the prosecution should have been brought within six months after the expiration of the twelve months limited by sect. 12, sub-sect. 1, of the Act. On case stated for the opinion of the Queen's Bench Division :—

Held, that the offence mentioned in sect. 12, sub-sect. 1, of the Act of 1863, was a continuing offence, and was not, as contended, a complete offence at the expiration of the twelve months after the passing of the Act, and that therefore a prosecution could rightly be brought, against the owner for the time being, to recover the prescribed penalties incurred by him during the period (as limited by 13 & 14 Vict. c. 88, s. 50) of six calendar months preceding the date of the summons.

Held, further, that sect. 41 of the Act of 1842 (5 & 6 Vict. c. 106) having been superseded and repealed, impliedly by sect. 9 of the Act of 1863, and in express terms by the Statute Law Revision Act of 1892 (55 & 56 Vict. c. 19), the provisions therein, by which its operation was confined to weirs "which extend more than half way across any river," could not be used to limit the general application of the words "every fishing weir" in sect. 9 of the Act of 1863, so as to exclude from its operation those weirs which did not extend more than half way across the river.

Held, further, that the Act of 1863 applied to eel weirs, and not to salmon weirs only, and that therefore, under section 9 of that Act, it was required that eel weirs should have a free gap in accordance with the regulations in that section.

Held, further, that the provisions in sect. 9 of the Act of 1863, that the

(1) Before SIR P. O'BRIEN, L.C.J., and O'BRIEN and JOHNSON, JJ.

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free gap should be "not less than one-tenth part of the width of the stream," must be construed as meaning one-tenth part of the width of that part of the stream which was intercepted between the extremities of the weir.

CASE STATED, pursuant to 20 & 21 Vict. c. 43, by Justices, sitting at Castleconnel Petty Sessions, County Limerick, on the 7th January, 1895, in the matter of two complaints then heard before them in regard to the Upper and Lower Castleconnel eel weirs. The summons was as follows:—

PETTY SESSIONS DISTRICT OF CASTLECONNEL, CO. OF LIMERICK.

JOHN MASSY WESTROPP, *Complainant:* THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND, *Respondents.*

Whereas, complaints have been made to me this day, as follows:—1. That you, the defendants, having been at, and ever since the time of, the commencement of the Salmon Fishery (Ireland) Act, 1863, owners of a certain fishing weir, that is to say, the upper of the two fishing weirs situate in the river Shannon, at or near Castleconnel, in the county of Limerick, which said weir was at the time aforesaid without a legal free gap, and not having made such gap from the time aforesaid up to the period of six months immediately preceding the making of this complaint, you, the defendants, did not, during said period of six months, make such legal free gap in said weir, but, being the owners of said weir, did leave the same without said gap for such period. 2. That you, the defendants, etc. [Then followed a complaint, framed in the same terms, in regard to the lower of the two weirs.] This is to command you, etc.

At the hearing of these complaints—which were framed under the Salmon Fishery (Ireland) Act, 1863 (26 & 27 Vict. c. 116), sect. 12, sub-sect. 1—it was admitted by the defendants that the said weirs were in existence at the time of the commencement of the Act of 1863, and that the defendants were then, and had been ever since, owners thereof; and it was admitted by the complainant that the weirs were used exclusively for catching eels, and that neither of them extended half way across the river, the measurements agreed to being—*Upper Weir*, 191 feet long; width of river, 500 feet; leaving a clear water way of 309 feet—*Lower Weir*, 207 feet long; width of river, 529½ feet; leaving a clear water way of 322½ feet. It was proved by the complainant that, at the time of

the commencement of the Act of 1863, these weirs were without a free gap, and that they had remained so down to the present.

The defendants contended that, by the law of Ireland, a free gap was not required in any weir extending less than half way across the river—relying on 5 & 6 Vict. c. 106, sect. 41, and *Rolle* v. *Whyte* (1); that the Salmon Fishery Act of 1863 was limited in its scope and operation to salmon, as defined by the Salmon Fishery Acts, and that sect. 9 of that Act did not apply to eel weirs; and, thirdly, that the summons was late, the offence under the section (sect. 12, sub.-sect. 1) being complete on the 28th July, 1864, and the prosecution not having being brought within six months therefrom—relying on 13 & 14 Vict. c. 88, sect. 50; *Marshall* v. *Smith* (2); and *Coggins* v. *Bennett* (3).

The prosecutor contended that sect. 41 of 5 & 6 Vict. c. 106, was repealed impliedly by sect. 9 of the Act of 1863, and expressly by the Statute Law Revision Act of 1892—citing *Reg.* v. *Commissioners of Public Works* (4)—and that *Rolle* v. *Whyte* (1) was a decision under an English statute which did not extend to Ireland, and was no authority in a case under sects. 9 and 12 of the Irish Act of 1863; that the Act of 1863 was a general Act, applicable to eels as well as to salmon—relying on sect. 44 of that Act, on 32 & 33 Vict. c. 92. sect. 20, and on *Devonshire* v. *Foott* (5); and that the offence under sect. 12, sub-s. 1, was a continuing offence, citing *Doran* v. *Cunningham* (6) and *Devonshire* v. *Foott* (5).

The Justices were of opinion that sect. 9 of the Act of 1863 applied to weirs extending less than half way across the river; that the Act applied to eel weirs, and therefore that there should be free gaps in these weirs—such free gap to be one-tenth of the width of the stream covered by the weir—but that the intention of the Legislature was that, within twelve months from the passing of the Act, a free gap should be made in every weir, and that the proper time to take proceedings for non-compliance therewith was within six months (see 13 & 14 Vict. c. 88, sect. 50), after the expiration of the said twelve months, and that it was not intended that the penalty should continue in perpetuity, the Inspectors of Fisheries

(1) L. R. 3 Q. B. 286.
(2) L. R. 8 C. P. 416.
(3) 2 C. P. D. 568.
(4) Fishery Cases, 12th June, 1861.
(5) Ir. R. 2 C. L. 514.
(6) 20 L. R. Ir. 544.

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having (under the 7th sect. of the Act of 1863), full powers to inspect the weirs, and if illegal to order their removal, or to fix a time within which gaps should be made. The Justices, accordingly, dismissed the summons, without prejudice, and, on the application of the complainant, stated this case for the opinion of the Queen's Bench Division on the question whether their determination was correct in law.

Redmond Barry (*The Right Hon. J. Atkinson, Q.C.*, and *Ronan, Q.C.*, with him), for the appellant:—

We submit that the Justices should have convicted the respondents, that their decision on the two main matters at issue was right, but that they were incorrect in holding that the summons should have been brought within six months from the 28th July, 1864.

1. Upon the first point: previous to 1841, the law in Ireland as to free gaps was governed by 23 & 24 Geo. 4, c. 40, sect. 11, which provided for a Free Passage or King's Gap of at least 21 feet clear in the deepest part—a general enactment, not limited to weirs extending more than half way across a river. Then came the Act of 5 & 6 Vict. c. 106, which was made to apply only to weirs "which extend more than half way across any river at the lowest state of the water thereof or more than half way across any branch thereof for the purpose of catching salmon, eels, or other fish." This limitation continued in existence only till 1863, when, as we submit, sect. 41 was impliedly repealed by the 9th sect. of 26 & 27 Vict. c. 114. Section 9 contains a complete enumeration of the regulations to be observed in the construction of free gaps in weirs; it re-enacts several of the requirements mentioned in sect. 41, omitting others, and must be taken to be "in substitution for, and therefore to have impliedly repealed the 41st sect. of the Act of 1842."

This was the argument of counsel for the respondents in *Devonshire* v. *Foott* (1) and we respectfully adopt it here. The Judges in that case refused to read into sect. 9 (1863), the provision as to settlement of disputes by the Commissioners contained in sect. 41 (1842), but omitted in the later Act, and they thus must

(1) Ir. R. 2 C. L. 514.

be taken to have held that sect. 41 was impliedly repealed, and George, J., expressly held this (1). Sect. 44 (1863) provides that the Act, "so far as consistent with the tenor thereof," shall be construed with the other "Salmon Fisheries Acts," but this cannot affect the question whether sect. 9 was intended to supersede sect. 41 or not. In any event, sect. 41 (1842) has been expressly repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict., c. 19), and sect. 9 must now be taken as alone governing the law in respect to free gaps in weirs in Ireland, which thus must be made "in every fishing weir" of whatever extent.

The English case of *Kolle* v. *Whyte* (2), upon which the respondents rely, was decided under the English Act of 1861 (24 & 25 Vict. c. 109), and there, by reason of the inconsistency of sections 12 and 27, the Judges were coerced to hold that the provisions as to free gaps applied only to weirs that did not extend less than half way across the stream, sect. 12 enacting that no fishing weir should be used for catching salmon "unless it have therein such free gap as is hereinafter mentioned," and sect. 27 providing that "where any fishing weir extends more than half way across any stream . . . it shall have a free gap or opening in accordance with" certain regulations. We are forced to admit that thus the law in England differs from the law in Ireland, but it is open to suggest that it was not the intention of those who framed the English Act to introduce this qualification; and this meets with support from what was said by Cockburn, C. J., in the case cited (3), that if their conclusion were inconsistent with the legislative intention they must leave it to Parliament to amend the statute. The case is an authority that sect. 9 (1863), being inconsistent with, must override sect. 41 of the Act of 1842.

2. The respondents contend that the Act of 1863 does not apply to eels. But, though this Act does not expressly mention eels, it is one of a code and is to be read as one with other Acts, commencing with the 5 & 6 Vict. c. 106, which deal in express terms with eels. The Act of 1863 is to be construed with the other Salmon Fishery Acts "so far as consistent with the tenor thereof" (sect. 44), and the 32 & 33 Vict. c. 92, sect. 20 provides that the Acts enumerated in the schedule shall be read and con-

(1) Ir. R. 2 C. L. p. 544. (2) L. R. 3 Q. B. 286. (3) *Ibid.* 305.

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strued together as one Act, and this schedule commences with the 5 & 6 Vict., includes the 26 & 27 Vict., and ends with 32 Vict. c. 9. It strangely excludes an Act, the 26 Vict. c. 10, which deals wholly with salmon. [*Vesey Fitzgerald*—That Act was not confined to Ireland.] These Acts are called "The Salmon Fishery Acts," generally, because of the greater importance of that fish, but their provisions are not confined to salmon, and the Act of 1863 is an amending Act, of general application, in which where its operation was intended to be confined to salmon and trout alone (as in sects. 4, 5, 18, 24), this was done expressly, and on the face of the section. Elsewhere, the Act uses general terms—"fish," "fishery," "fishing weir," as in sect. 9 which commences, "In *every* fishing weir." By the definition in 13 & 14 Vict. c. 88, sect. 1, "fish" extends to and includes oysters and oyster brood. Sect. 41 (1842) provided expressly for free gaps in eel weirs; if that section is gone, then there is now no necessity for a free gap in any eel weir in Ireland, whether it extends across the whole width of the river or not.

3. As to the third point, we submit that this was a continuing offence. Sect. 12 (1863), sub-sect. 1, under which these prosecutions were brought, provides that where a weir is without a free gap at the time of the commencement of the Act, *i.e.*, 28th July, 1863, "the owner shall, within twelve months from the commencement of this Act, make such gap, and if he does not, he shall incur a penalty not less than £5 and not exceeding £50 for every day after the expiration of such period of twelve months during which he does not make such gap." The other sub-sections of sect. 12, sub-sect. 2, which provide penalties for not maintaining, and sub-sect. 3, which forbids alterations in the bed of any river so as to reduce the flow of water through the free gap, obviously create continuing offences. If not, *Foott's Case* (1) would never have been heard. *Marshall* v. *Smith* (2), and *Coggins* v. *Bennett* (3) are distinguishable on the facts, and the former case was distinguished and explained in *Rumball* v. *Schmidt* (4) where the offence, under sect. 156 of the Public Health Act of 1878, of building an addition to a house stretching beyond the front of the

(1) Ir. R. 2 C. L. 514.
(2) L. R. 8 C. P. 416.
(3) 2 C. P. Div. 568.
(4) 8 Q. B. Div. 603.

house without the consent of the urban authority, was held to be a continuing offence. See also *Ray* v. *Gateshead* (1).

Vesey Fitzgerald and *Seymour Bushe*, *Q.C.* (with them *The Attorney-General*, *The Right Hon. The Mac Dermot*, *Q.C.*), for the respondents :—

1. We submit, first, that sect. 9 (1863) does not apply to any weirs but those which extend more than half way across the river. The Act of 23 & 24 Geo. 3, c. 40, sect. 11, dealt only with weirs which stretched across the whole stream—with "persons who form a complete chain of obstructions across great rivers," *i.e.*, navigable rivers (2); and sect. 41 of the Act of 1842 was expressly confined to weirs extending more than half way across any river. Such was the state of the law when the Act of 1863 was passed. Sect. 9 of that Act, which is obviously modelled on sect. 27 of the English Act of 1861, does not contain this limitation, which is to be found in the English section. Why? Because the draftsman, or the Legislature, found that it was already part of the existing law in Ireland. The two Irish Acts are to be read as one, and any reasonable construction upon which these sections, 9 and 41, can be read together, should be adopted. "The general words of an Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched"; per Romilly, M. R., in *Minet* v. *Leman* (3), cited in Hardcastle, On the Interpretation of Statute Law (Ed. 1891), p. 208. Upon the point now in question there is an apparent inconsistency or repugnance between sects. 9 and 41, but "unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied," per A. L. Smith, J., in *Kutner* v. *Phillips* (4). In *Rolle* v. *Whyte* (5) there was a similar repugnance between sects. 12 and 27 of the English Act of 1861, and there the Court of Queen's Bench held that the apparent generality of the one section was confined by the express limitation in the other; so here sect. 9, read with a proper

(1) 52 L. T. 68.
(2) See *Rolle* v. *Whyte*, L. R. 3 Q. B. at p. 300.
(3) 20 Beav. 278.
(4) [1892] 2 Q. B. 267.
(5) L. R. 3 Q. B. 286.

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regard to the existing state of the law under the incorporated statutes, must, we submit, be restricted to weirs extending more than half way across the stream. Upon this construction both sections will stand together. The insertion in sect. 9 of the proviso abolishing the right to compensation (conferred by sect. 41), so far from showing that sect. 41 was wholly superseded, goes to prove that the sections were to be read together, for the inference is that if this proviso had not been inserted the right to compensation under sect. 41 would still have continued to exist. Further, if the section be not so restricted, a great injustice and absurdity (against which in an Act of the Legislature, there is the strongest presumption) would arise, for this construction would involve the practical abolition of all weirs less than half the width of the stream in extent, if their length was not considerably in excess of the minimum width of the gap, *i.e.*, one-tenth the width of the stream. Sect. 9 says, "The width of the gap in its narrowest part shall be not less than one-tenth part of the width of the stream," and fixes a maximum of 50 feet and a minimum of 3 feet. This cannot mean, as was contended in the Court below, one-tenth part of that part of the stream intercepted by the weir, nor can the language of Fitz Gerald, J., in the *Lax Weir Case* (1) be taken as supporting that view. The Act of 1841, sect. 41, shows that this cannot be so, for it says the gap "shall not be less than 40 feet in the clear in all such rivers or branches as aforesaid of and exceeding 400 feet in breadth, and not less in the clear than one-tenth part of the breadth of such river or branch thereof in all such rivers or branches as aforesaid of less than 400 feet, the breadth of such rivers or branches, as aforesaid, in all cases to be ascertained by measuring the natural bed thereof at the place where such weir, dam, or dyke shall be erected without reference to any walls, artificial banks, or erections." The measure is the river in a particular state. So, in the English Act of 1861, sect. 27 provides that "where any fishing weir extends more than half way across any stream at its lowest state of water . . . the free gap shall be situate in the deepest part of the stream, between the points where it is intercepted by the weir . . . 4, the width of the gap in its narrowest part shall

(1) Fishery Cases, 12th June, 1861.

be not less than one-tenth part of the width of the stream," omitting the words that had occurred in the first clause. "Stream" in the 4th clause means the *whole* stream, and this construction underlies the judgments in *Rolle* v. *Whyte* (1) where Cockburn, C. J., in delivering the judgment of the Court relies as an argument on the injustice to which we have adverted, and held also that no distinc- could be taken (as was sought to be done before the Justices in the present case), between the words "stream" and "river." *Rolle* v. *Whyte* (1) was followed immediately afterwards in the Court of Exchequer in *Leconfield* v. *Lonsdale* (2). The absurdity and injustice is this, that in the case of a river 500 feet broad, as is the Shannon at Killaloe, every weir of any length not exceeding 50 feet, would be wholly swept away. The Lower Moyse Weir at Killaloe, 54 feet long, is an actual instance. The English statute being *in pari materia* may be used in construing the Irish Acts:— *Reg* v. *Mason* (3), *R.* v. *Munoz* (4), *Cotterall* v. *Sweetman* (5), cited in Hardcastle, p. 149.

In *Devonshire* v. *Foott* (6), the Judges avoided deciding generally that section 9 had impliedly repealed section 41. Their decision was that the clause in section 41, giving to the Commissioners power to determine disputes was inconsistent with section 9. The point now in issue was not present to their minds, and any general observations which might appear to bear upon the present case, were not necessary to their decision and must be regarded as extra-judicial.

As to the Statute Law Revision Act of 1892. If section 41 and section 9 were, as we contend, to be read and construed together, then from 1863 to 1892, section 9 bore the restricted meaning which its association with section 41 imparted to it. Having acquired that meaning it would not, we submit, lose that meaning by the repeal in 1892 of section 41. It may no doubt be said that if a clause in a statute is repealed, it is to be taken as if it never existed; but it cannot be said that where a particular clause in an Act is repealed, the whole Act must be read as if that

(1) L. R. 3 Q. B. 286.
(2) L. R. 5 C. P. 657.
(3) 2 T. R. 586.
(4) 2 Str. 1127.
(5) 9 Jur. 954.
(6) Ir. R. 2 C. L. 514.

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clause had never been enacted: see *A.-G.* v. *Lamplough* (1). A Court of Law is entitled "to look at the repealed portion of an Act to see what is the meaning of what remains of the Act, otherwise it would follow that an Act of Parliament, which at one time had one meaning, would by the repeal of some one clause of it, have some other meaning": per Bramwell, L.J. (2), cited in Hardcastle, p. 393. If the Court decides that section 9 bears a different meaning since 1892 from what it bore before, the Court must decide that the Revision Act is a declaratory Act without it being so in terms, and that it is retrospective without its being so in terms. This argument is strengthened by the manner in which the preamble of the Revision Act qualifies the effect of its repeals.

2. The Act of 1863 applies only to salmon and fish of the salmon kind. The Act is part of a general code applying to fisheries of all kinds, and therefore the longer title—assuming that this is on the Roll of Parliament, which is probably not the case, and that it may be looked at in construing the Act—is general in its terms, and properly so, "an Act to amend the laws relating to Fisheries in Ireland"; but the *preamble* expressly refers to "the law relating to the *Salmon* Fisheries in Ireland," and it is settled that a preamble may be resorted to explain an enactment where its scope or meaning is not clear, and may limit as well as extend its operation: *Crespigny* v. *Wittenoom* (3); *The Sussex Peerage Case* (4); *Crowder* v. *Stewart* (5); *L'Apostre* v. *Le Plaistrier*, cited in *Copeman* v. *Gallant* (6); *Ryall* v. *Rowles* (7); *Brett* v. *Brett* (8); *Davis* v. *Kennedy* (9); *Winn* v. *Mossman* (10); cited in Hardcastle, pp. 223, 224. *Rolle* v. *Whyte* (11) also affords an example of the restrictive effect of a preamble. This preamble has been repealed by the Statute Law Revision Act of 1892 (55 & 56 Vict. c. 19), but it may still be resorted to in construing the statute, on the same principle as is laid down in *A.-G.*

(1) 3 Ex. 223.
(2) *Ibid.* 227.
(3) 4 T. R. 793.
(4) 11 Cl. & F. 143.
(5) 16 Ch. D. 368.
(6) 1 P. Wms. 318
(7) 1 Atk. 174.
(8) 3 Addams, 219.
(9) Ir. R. 3 Eq. 697.
(10) L. R. 5 H. L. 389.
(11) L. R. 3 Q. B. 286.

v. *Lamplough* (1). As to the value and practical effect (if any) of such repeal, see Hardcastle, p. 226, citing the opinion of Sir F. Pollock. The *Short Title* ("The Salmon Fishery (Ireland) Act, 1863"), is part of the Act, and may be used to show the intention of the Legislature: *Middlesex Justices* v. *The Queen* (2); *Comber* v. *Berks. JJ.* (3); Hardcastle, p. 213. Taking next the *sections* of the Act, though those that deal with matters of procedure no doubt are of general application—*e.g.*, sections 14, 15, and 27 to 43 (excepting perhaps sections 30 and 31), and section 45—as might naturally be expected where a new Court of general control was being constituted, yet not a single authorizing or mandatory section (as opposed to procedure sections) either expressly or by necessary implication refers to eels, or to any fish but salmon, including under this term fish of the salmon kind, while the great majority of the sections of this class either in terms or by force of the context are clearly applicable to salmon alone. General terms, "fish," "fishery," "net," "fixed engine" (see definitions in 13 & 14 Vict. c. 88, s. 1), are indeed used; but, again and again throughout the Act they are necessarily and obviously limited in their application to salmon, only a few sections being colourless in this regard. Section 3 prohibits bag-nets, and then speaks of "*salmon* taken by such bag-net." Section 4 deals with "fixed nets," and expressly limits the application of these general words by saying, "No fixed net that was not legally erected for catching *salmon or trout*," &c., and speaks of "*salmon* taken by such net." So section 5 provides for the abatement of "all fixed nets erected or used for catching salmon or trout" as are injurious to navigation and for the removal of "all such other fixed nets *erected or used as aforesaid*" (*i. e.* for catching salmon) as are in contravention of law. Section 6 refers to the nets erected in pursuance of sections 18 and 19 of the Act of 1842, that is salmon nets, and speaks of "bag-net prohibited by this Act" which (see section 3) must be bag net for salmon. In section 10 the regulations as to the boxes and cribs in fishing weirs show that these were salmon weirs. Section 11 speaks of the weekly close time. Section 13 obviously refers to the nets already mentioned

(1) 3 Ex. D. 223. (2) 9 App. Cas. 757. (3) 9 Q. B. Div. 33.

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in sections 10 and 11. Section 16 speaks of "rods and lines," and subsequently of "net instrument or device for taking fish," which general terms should, we submit, be construed *ejusdem generis* with the same words in sections 20 and 21, where they occur in necessary connexion with salmon. Sections 18 to 25 deal expressly and exclusively with salmon; and so also section 26, which, revising the scale of duties as to salmon, leaves duties in respect of eel weirs (under 11 & 12 Vict. c. 92, schedule) untouched. Section 30 deals with "turbines and similar hydraulic machines which may be injurious to salmon, or the young of salmon." [O'BRIEN, J.: That shows the general object of the Act, the protection of the fish. An eel weir may be injurious.] Eel weirs are only fished at night, and in flood, and during another season of the year than salmon weirs. The weirs now in question have been found by the Inspectors to be not injurious. This 30th section, however, seems misplaced among sections dealing with matters of procedure, but its object still is the protection of salmon only. Section 31, deals with salmon-passes and fish-ladders [*Atkinson, Q.C.*: These are the passes provided for by 5 & 6 Vict. c. 106, s. 33, and 11 & 12 Vict. c. 92, s. 20, to allow of "the free run or migration of salmon, trout, *and other fish* at all periods of the year.] Even so, this section merely gives a power of inspection, and cannot extend to other matters the powers which this Act confers, if our argument be right, in regard to salmon alone. Section 44 provides that the Act "so far as is consistent with the tenor thereof," shall be construed with the other Acts relating to salmon fisheries in Ireland. This method of incorporation implies that there are portions of the code inconsistent with the tenor of the Act, which portions therefore are not to be incorporated: see *Mather* v. *Brown* (1), cited in Hardcastle, p. 152. Section 47 obviously refers to the altered license duty on salmon fishing (see section 26). Of the only remaining sections, 17 and 46 are quite colourless; and thus there remain of the authorizing or enabling sections only sections 7, 8, 9, and 12 which might on their face be of general application; and these, we submit, should be read subject to the same limitation as is found to govern the use of equally general

(1) 1 C. P. D. 596.

terms in all the other enabling sections of the Act. [JOHNSON, J.: Is not the result of your argument that from 1892 to the present time, there is no provision for eel weirs or mill-dams?] If the Legislature has repealed section 41, *per incuriam*, it is for the Legislature to remedy this; but there is a power, under 13 & 14 Vict. c. 88, sect. 14, to abate any weir on the application of an aggrieved party.

Thus the short title—the preamble—the express limitation of general terms such as "fish," "fishing weir" in almost every enabling section of the Act—the presumption that the same words should bear the same meaning throughout the same Act—and the presumption against any alteration in the law beyond what the Legislature, in express terms or by unmistakable implication, declares—all show, we submit, that in the 9th and 12th sections the words "fishing weir," &c., must be construed in reference to salmon. These sections should be construed *ex visceribus actus*, and "expounded not according to the letter but according to the meaning and the spirit of it" (1).

[O'BRIEN, J.: That principle was applied in *Reg.* v. *Guardians of Mallow Union* (2)].

3. The prosecution is, in any event, too late. Section 12, sub-sect. 1, says, that where a weir is without a free gap at the time of the commencement of the Act, the owner of such weir shall, within twelve months from the commencement of the Act (28th July, 1863), make such gap, and if he does not, he shall incur a penalty, &c. "He" must be the owner on the 28th July, 1864, the offence being complete on that day: see *Marshall* v. *Smith* (3); *Coggins* v. *Bennett* (4).

Atkinson, Q.C., in reply.

The policy that underlies the fishery laws during the last three centuries has been, not the protection of fishery owners, but the protection of the fish, especially the fry and spent salmon when descending the rivers. The Fishery Inspectors found indeed

(1) *Per* Lord Selborne on the Collier appointment, cited in Hardcastle, page 115.

(2) 12 Ir. C. L. R. 35, 40.

(3) L. R. 8 C. P. 416.

(4) 2 C. P. D. 568.

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that these weirs were not injurious, that is, to salmon going up stream; but our allegation is that these two weirs, forming almost a continuous structure across the river, are a serious obstruction to the fry and spent salmon when going down from the spawning beds. This general policy was carried into effect by 11 Eliz. c. 4; 10 Car. 1, c. 14, and Geo. 3, c. 40, ss. 11 and 12. The Act of 1842, which repealed these statutes and consolidated the fishery laws, though it in the main preserves the same policy, was passed in the interests of fishery owners, enabling them to erect new weirs in tidal waters, providing for compensation to them before their weirs could be interfered with, and limiting the requirement that there should be free gaps to those weirs only which extended more than half way across the stream. The Act of 1863 made a return to the former policy; it put an end to the right of erecting new weirs; it swept away the provisions for compensation under the Acts of 1842 and 1850 which had rendered the restrictions in those Acts unworkable, and by sect. 9 enacted a new and complete set of regulations as to free gaps in all weirs—omitting the distinction between longer and shorter weirs, omitting the power given by sect. 41 to the Commissioners of determining disputes, and providing that no fishery owner should be entitled to compensation by reason of the enforcing of any free gap in any weir. *Devonshire* v. *Foott* (1) is a direct authority that sect. 41 was impliedly repealed by sect. 9; *Rolle* v. *Whyte* (2) was a decision on two inconsistent sections of the same Act, and there it was necessarily held that the latter section must control the former; while here the defendant's argument is that, though twenty years intervened between the Acts of 1842 and 1863, the latter Act must be cut down by the limitation which had been inserted in the earlier one. A similar argument was put forward in *Parker* v. *Pim* (3) on the construction of sect. 27 of the Act of 1842, and was there held to be untenable, and also in *Wylie* v. *Moffatt* (4) on the construction of sect. 3 of the Married Women's Property Act of 1893 (56 & 57 Vict. c. 63). No injustice or absurdity arises; for in sect. 9, sub-sect 1 ("the free gap shall be situate in the deepest part of the *stream*"), "stream" must mean that part of the stream

(1) Ir. R. 2 C. L. 514.
(2) L. R. 3 Q. B. 286.
(3) Ir. R. 3 C. L. 572.
(4) [1895] 2 Ch. 116.

that is intercepted by the weir, and this is distinctly expressed in sect. 27 of the English Act of 1861; and so, too, in sect. 9, sub-sect. 4, "one-tenth part of the width of the stream" means the stream intercepted by the weir, or, in other words, one-tenth of the length of the weir. If the Act of 1863 is, as is contended, confined to salmon only, then—ever since the implied repeal in 1863 of sect. 41 and of all the other provisions which had regard to compensation—and, beyond all controversy, since the Act of 1892, which repeals as spent not only sect. 41 but a large part of these Acts of 1842 and 1850—there is absolutely no provision as to gaps in any other than salmon weirs; there is nothing in this code to prevent any person from building a weir or dam across the river without any gap so long as he does not use it for catching salmon, and thus the migration of fish and fry are left at the mercy of anyone who may choose to erect a weir if only he does not use it for salmon. The Act of 1863 is a general Act in which no doubt just as in the earlier Acts, though some sections refer exclusively to salmon, others are quite general, as well in their terms as in the intention that underlies them. Section 9 follows two sections which are in the widest terms, speaking of "all fishing weirs," and of "any fishing weir upon any river."

The other sub-sections of sect. 12 certainly create continuing offences; why not the first, which provides for the matter which is of the most importance for the protection of the fish and fry? The provisions of previous Acts for enforcing free gaps imposed continuing penalties; see 23 & 24 Geo. 3, c. 40, ss. 11 and 12, and 13 & 14 Vict. c. 88, s. 22. The Justices should therefore have convicted the defendants.

Cur. adv. vult.

June 29.

SIR P. O'BRIEN, L.C.J.:—

This case has been stated for our determination pursuant to the provisions of the 20 & 21 Vict. c. 43. The statement of it, which is very perspicuous, reflects creditably upon the care and skill of the presiding magistrates, Messrs. Irwin and Gabbett. The question involved is of very great general importance, namely—whether the owner of an eel weir, which had no free

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gap in it at the passing of the Salmon Fishery (Ireland) Act, 1863, or since, is liable to penalties for not having made a free gap in such weir, and for what period of time these penalties can be enforced.

The case depends upon the true construction of the 9th and 12th sections of 26 & 27 Vict. c. 114. As to the first question, viz., the necessity for a free gap in every fishing weir, the principal section is the 9th. The important words of that section are:— "In every fishing weir there shall be a free gap or opening in accordance with the regulations following, under the powers of this Act." If the case rested here, in my opinion no difficulty whatsoever would arise; the words are "in every fishing weir," and there is no limitation in the 9th or any other section of the Act as to the weir extending more than half way across the river.

We should give to these words their natural meaning; but it is said that, as all the Fishery Acts constitute one code, this section must be read with the 41st section in the 5 & 6 Vict. c. 106; and that, inasmuch as that section was applicable by its express terms only to weirs which extend more than half way across the river, and as the weir in question does not extend so far, it is not obnoxious to the statutable provisions as to a free gap. This argument is, in my opinion, wholly unsustainable. For it is, in our judgment, quite clear that the 41st section of the Act of 5 & 6 Vict. c. 106, was impliedly repealed by the 9th section of the 26 & 27 Vict., c. 114. The words in the 9th section of the later Act are "every fishing weir," and every provision of the 41st section of the former Act, as to the site, character, and construction of weirs, is either modified or in identical terms re-enacted in section 9 of the later Act. The 9th section, while omitting the limitation as to extending half way across the river, not only deals with the entire subject-matter so far as relates to the site, character, and construction of weirs exhaustively, but re-enacts, as I said, in identical language, some of the provisions of the 41st section of the antecedent Act. But what else have we? We have the all-important fact that the 41st section of the 5th & 6th Vict. is expressly repealed by the Statute Law Revision Act of 1892, which purported to repeal Acts because they were spent. It has been argued at very considerable length that the

9th section of the 26 & 27 Vict. applies only to salmon weirs. This is untenable. There are various sections, some applying exclusively to salmon, others to both eels and salmon; and an important section, namely the 7th section, provides that the Commissioners shall inquire into the legality of "all fishing weirs" throughout Ireland. This is as comprehensive as language could be; but not more so, in my opinion, than the language used in the 9th section of the same Act, which uses the words "in every fishing weir." And it is to be remembered that the word "fish," in the same code, includes even oyster and oyster brood.

But there remains what appears to me a conclusive argument upon this subject, namely, that inasmuch as the 41st section of the 5 & 6 Vict. is repealed by the Statute Law Revision Act of 1892, unless the 9th section of the 26 & 27 Vict. extends to eel weirs, there is now no provision at all as to gaps in such weirs, though the 41st section of the 5 & 6 Vict. expressly extended to eel weirs. Why should the Legislature, which, not only in the year 1842, but at a period antecedent to that time, as Mr. Atkinson has pointed out, was solicitous for the free migration of eels, subsequently put their migration aside as wholly unworthy of their care? It is plain that the 9th section of the 26 & 27 Vict. applied to eels, and was substituted for the 41st section of the Act of 1842. The English case of *Rolle* v. *Whyte* (1) so far from being in favour of the defendants, is in substance, having regard to its *ratio decidendi*, an authority against them; for were it not for the 27th section of the English Act, and the direct reference in the 12th section of that Act to the 27th section thereof, the case would have been decided otherwise. Here the limitation that was in the 41st section of the 5 & 6 Vict., which must have caught the eye of the draftsman and Legislature, if any attention at all was paid to the matter, was not only omitted from the 9th section of the Act of the 26 & 27 Vict., but is not to be found anywhere in that Act. It is strange that the law in England and Ireland should be different with reference to this matter; but the Irish Act is different from the English Act, however that result was brought about, whether by oversight or design.

(1) L. R. 3 Q. B. 286.

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I do not think there is anything in Mr. Bushe's argument, founded on the assertion that the width of the gap must be ascertained by reference to the width of the river. He contended that if the particular structure in question was to have a gap of a width one-tenth of the width of the river, it, as well as many other weirs, would practically disappear; but this argument is, as I said, not well founded, as is shown by the hypothesis upon which it was based. Mr. Bushe proceeds upon the basis that there must be a gap in weirs that extend more than half way across the river, and that the gap must be in the deepest part of the river. Now, if the gap must be situate in the deepest part of the river, it would be impossible—in weirs that extended more than half way across the river, but did not cross its deepest part—and there may be, and are no doubt, many such weirs—to comply with the provisions of the statute. The gap, according to Mr. Bushe, must be where the river is deepest. But the weir may not reach that place at all. Therefore, in the case of a weir that extended more than half way across the river, but did not cross its deepest part, the Act would not work. But this anomaly is got rid of by holding, as I do, that "width of the stream" means width of that part of the river which is met or crossed by the weir.

It will be seen that my judgment, in reference to this portion of the case, as to the necessity of a free gap in every fishing weir, is founded upon the consideration of the Fishery Acts themselves, and of the Statute Law Revision Act of 1892, upon which I prefer to rest my judgment; but the view I have taken seems to be in accordance with the opinion of Lord Chief Justice Whiteside and Mr. Justice George in the case of *Devonshire* v. *Foott* (1), though I do not think that case necessarily decided the point in issue here. My view is also in accordance with the principle of construction applied by Chief Justice Monahan in *Parker* v. *Pim* (2). The latter is a useful case, showing how, in this self-same fishery code, the words of a later Act of Parliament, if in themselves plain, cannot be controlled by a clause in a prior Act of Parliament, though the former Act is one of the self-same code in which the

(1) Ir. R. 2 C. L. 514. (2) Ir. R. 3 C. L. 572.

later Act is comprised. The earlier Act in *Parker* v. *Pim* (1) was the self-same Act of the 5 & 6 Vict. which we have been dealing with in this case.

We think, then, that the magistrates were right in holding there should be a free gap in the weir in question. It was to this question that the argument before us was mainly addressed.

There remains the question whether the time for bringing the prosecution in the Petty Sessions Court had lapsed. The magistrates held that it had, and dismissed the case. We are of opinion that they were wrong in so holding. Indeed, I did not think much stress was laid upon this part of the case by the counsel for the defendants, and very naturally so. The view of the magistrates is unsustainable. The cases which were referred to in support of their decision are distinguishable. Here there is a continuing offence created by statute. There is a fresh offence punishable by a new penalty for each day the gap is not made after the period of twelve months mentioned in the sub-section. This is not a case where the doing of a single positive act is punishable. This is a case of omission throughout, omitting to do the act within the time originally limited, and omitting to do it each day thereafter; and the object of the statute is to rectify the omission by getting that which is prescribed done. Indeed it would be a curious anomaly that the owner who made a free gap and did not maintain it should be liable to a penalty for each day during all the time he did not maintain it, as he would under the 2nd sub-sect. of the 12th sect. of the Act, and that, in the case of an owner who did not make it at all, the penalties should be limited to those which accrued within six months of the expiration of the twelve months mentioned in the 1st sub-section. Of course there is the limitation of time as to how far back the penalties can be sued for, that is, six months before this prosecution is instituted; but the penalties extending over these six months may be recovered.

The opinion of the magistrates upon this point was erroneous, and the case must accordingly be remitted to them.

(1) Ir. R. 2 C. L. 572.

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O'BRIEN, J.:—

This is a case which has been stated by magistrates on a fishery prosecution; and, though turning substantially on a single point, requires a somewhat extensive examination of the Fishery Acts of Ireland, and even of England also, as bearing upon that point. The point in the case, on which a very wide argument from various sides converges, is whether the 9th section of the Act of 26 & 27 Vict. c. 114, requiring a free gap, applies to eel weirs at all, or to eel weirs of a certain limited extent. The defendants are the owners of an eel fishery on the Shannon, of such value as to be let to a tenant at not less than £2,000 a year, and the complainant is the owner of a salmon fishery lower down. The weir in question is not continuous across the whole of the river, but consists of two arms running out from opposite banks, each less than half the whole width of the river, one at an interval of some sixty yards below the other, not therefore directly crossing the whole stream, but placed, it was alleged, from the direction of the river and its affluents, so as to meet a volume of water somewhat greater than their proportion to the whole width. The magistrates, while determining all the other facts in favour of the complainant, considered that he was barred by the lapse of time, and on that ground dismissed the summons, and have required to be informed by us whether they were correct in their determination. It appears to be clear beyond reasonable dispute that they were not correct. The 12th section of the statute requires the free gap, where there is none already, to be made by the owner within twelve months after the commencement of the Act, which was passed in the year 1863, and says that, if he does not do so, he shall incur a penalty "for every day after the expiration of such period of twelve months during which he does not make such gap"; and the next clause imposes a penalty for each day for not maintaining the gap in case it is already in existence. The plain object of the statute was to give a sufficient time to make the gap, and to secure the observance of the law to all time by a penalty against the owner for the time being, if it were not made—which object would be defeated in a most ridiculous manner if the command of the statute were only to hold good for the twelve months and the period of six months afterwards under the Petty Sessions Act, while the penalty for not maintaining it

would not be restricted to any limit of time, so that, as counsel observed, the person who did not do the work at all required for the public benefit, would enjoy an immunity that did not belong to the person who did not keep it up. There are a great many statutes passed for objects of public policy, which depend in like manner for their execution on the power of imposing penalties, and which would be wholly useless if this extraordinary point were good. The Act complained of, to which the limit of time in the Petty Sessions Act applies, is the omission to make the gap, and that is continuous though the penalties can only embrace the period of six months preceding the summons, and cannot go back so as to take in that prodigious figure which Mr. Bushe has made out with alarming rhetoric and the aid of compound interest.

As to the argument, that it was the person who was originally in default in not making the weir that was alone liable, that is equally untenable. The word "he" in the second part of the clause must mean owner, though he was not owner at the time the duty to make the gap commenced. We may pass away therefore from the ground on which the magistrates dismissed the case, and which was clearly erroneous.

The real question admitting of argument turns upon the scope and extent and application of the principle that statutes, which are general in themselves, may nevertheless not apply to subjects that otherwise would appear to fall within their literal language; and this was the main drift of the able argument of Mr. Fitzgerald, based upon a critical examination of the various sections of the Act of 26 & 27 Vict. with a view to show that it was intended to apply to salmon only, and had nothing to do with eel weirs at all; and there can be no doubt that the criticism of the various sections results in presenting this point in a very acute and critical form, so that Mr. Atkinson considers it necessary to meet it by the argument that the leading object of the Act is not the capture of salmon, but the preservation of the fish, which object ought to be carried into any vacant or general enactment that affords room for it. It is admitted that unless the 26 & 27 Vict. applies, there is now, since the Statute Law Revision Act of 1892, no enactment applicable to eel weirs.

If therefore we can discern a leading policy in the several Acts,

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which policy would presumably be carried on by the Legislature, that policy would naturally flow into and satisfy general words in the particular Act capable of being construed so as to give effect to it. On the other hand, we have to see whether the examples, to be collected from the cases, of the conditions which introduce the rule that general enactments, comprehending thereby particular subjects, nevertheless do not embrace them, furnish a principle which applies to the present case.

Now it is admitted that since the Statute Law Revision Act of 1892, which repeals the 41st and other sections of the Act of 5 & 6 Vict., there is no enactment applicable to eel weirs, unless they fall within the 26 & 27 Vict. c. 114. We start from that. It is further certain that the authority which presides over weirs of whatever kind—their regulation, removal, or prohibition—is constituted by this statute and exists under it alone, which is an argument that the subjects are general since the control is general, and that the mind of the Legislature was not turned away from fisheries generally to the subject of the salmon fishery alone. It may be conceded that it was salmon alone, or fish of that species, the Legislature was thinking of, its preservation or promotion, even in the constitution of an authority of a more general kind. But the question is whether its attention was confined to salmon fishing weirs in the means provided for the propagation and increase of the fish. Now the statute 26 & 27 Vict. c. 114, in section 9, relating to gaps in fishing weirs, is copied from the English Act of 1861, and that again is based upon the Irish statute of 5 & 6 Vict., which carries us back by reference to the Ante-Union legislation on the subject, of which there exists a considerable body. In order therefore to solve the question, what is the scope of section 9, and whether the fishing weirs, in which the gap is required to be made, include any other than salmon weirs, we have to take up this code of legislation from the fountain, and follow the stream down its course, and see whether it meets any check that would turn its direction before we reach the present statute. The earliest of the Acts upon this subject was the 28 of Henry 8, c. 22, entitled "An Act for Weirs upon the Barrow and other Waters in the County of Kilkenny," "through which," it was recited, "the salmon frie breeding in the said

waters and rivers be cleerly destroyed," and it gave power to prostrate those weirs. The next was a statute of 11 Eliz. c. 4, entitled, "An Act for the preservation of Salmon Frie and Ele Frie," which was passed to prevent the practice of allowing swine to feed upon the young of fish. Another Act for the same object was the 10th Car. 1, c. 24, called "An Act against the killing of young Spawne and Frie," which was directed against the taking of them by any means whatever. The killing or taking of salmon fry was again prevented by the 2 Geo. 1, c. 21, intituled "An Act to prevent the destruction of Salmon Fry, and for better preserving the Salmon Fisheries in this Kingdom," which recited that "the salmon fishery was extremely decayed by killing the spawning fish in certain months during the time of spawning, and by millers and other persons putting cod nets, baskets, and other engines at their mill tails, and taking the young salmon fry as they are endeavouring to go down to the sea in the months of March, April, and May," and prohibited in future the use of certain means set forth of taking salmon, and of any means for killing fry. This was followed by a multitude of statutes having for their object the promotion, not only of the salmon, but other fisheries; but I have taken only those which specifically refer to the spawning of salmon and the preservation of the fry as the objects of the Legislature.

All these statutes were repealed by the general Act, 5 & 6 Vict. c. 106, which substituted other provisions for the same objects, and enacted in the 41st section—the enactment we have principally to deal with—that "in all standing weirs, dams, or dykes of what nature or kind soever which extend more than half-way across any river at the lowest state of the water thereof, or more than half-way across any branch thereof, for the purpose of catching salmon, eels, or any other fish, a free gap, or Queen's space, shall be left or formed in the deepest part of such river or any such branch."

Now the main question is—whether the exclusion by this section of such weirs as do not extend more than half-way across, which is the case with the weir of the respondents, is to be carried into the late statute, so that "every fishing weir" in the 9th section of the 26 & 27 Vict. has a meaning outside its ordinary

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language, and applies only to weirs not excepted in the Act of 5 & 6 Vict.; and this argument has been assumed to depend wholly upon the point whether the 41st section of the 5 & 6 Vict. was repealed by the 9th section of the latter Act. For, if it were repealed, this concludes the case against the defendants, though it by no means follows that the opposite construction is conclusive against the complainant. Repealed it certainly, in point of law, was, if the 9th section makes complete provision for the same subject as the previous Act; for the inconsistency that will cause one statute to be repealed by another is not confined to their contradiction, but may exist by their complete agreement, as it cannot be supposed the Legislature intended to do something that was wholly unnecessary. Accordingly a considerable amount of criticism has been bestowed upon a comparison of the two sections, with the result not only that there is an entire set of substantive provisions made by the later Act for exactly the same purposes as in the earlier one, but that there are certain provisions in the 41st section which are expressly repealed by the 9th section; and it is contended that the description as to the extent of the weir is repealed by the substitution of the words "every fishing weir."

As to the point at first suggested, that eel weirs were not at all within the 9th section, that must at once be given up, because weirs for catching eels are expressly mentioned in the former Act. Now the defendants are in a position of extreme difficulty as to the argument that the exception, in the 41st section, of weirs not going across the whole river still subsists, because in the first place the 41st section was repealed by the Statute Law Revision Act, 1892, the result of which is not only that there is now no statute in existence requiring a gap in eel weirs at all, unless the 26 & 27 Vict. applies, but also that there is no statutory exception of weirs of a certain length.

This difficulty, however, is sought to be got rid of in this way—it is said that, during the existence of the 41st section, "fishing weirs" in the 9th section of the 26 & 27 Vict. had acquired the more limited meaning of weirs exceeding half the width of the river, from the necessity of being construed with the 41st section, and that this limited meaning still remains attached

to the words. Is this argument sound in law? How are we to know but that, in repealing the 41st section by the Statute Law Revision Act, it was intended to repeal the 41st section, not only in its direct operation but also, as part of that operation, in the effect it had during its continuance upon the construction of section 9, and to leave therefore the description in that section of "every fishing weir" standing in its full extent unabridged by the presence of its former partner? I greatly doubt the validity of this argument, for which we did not hear any authority cited—that a temporary meaning impressed upon an Act through the existence of another Act, would continue after the other Act was at an end—that the stream would still flow though the fountain was stopped—the breath of meaning animate the words, after the life was gone. Gone at all—one would say it was gone for all purposes—for construction as well as operation.

The foundation of this argument, however, is that there was a period of time when the two enactments existed together, and that the 41st section was not repealed by section 9 of the new statute. On this point a case was referred to in the argument as an authority, *Devonshire* v. *Foott* (1), which was decided in the year 1868, consequently after the 26 & 27 Vict., and in which the power of the Commissioners under the 41st section to determine disputes came in question; but, on looking carefully at the case—though the question was directly adverted to by Lord FitzGerald, whether the powers under that section were repealed—the result will be found to be consistent with the absence of any decision upon that point, and did not necessarily determine that the 41st section had ceased to exist, as the judgment of the Commissioners relied on was asserted to be in exercise of the power they possessed no less under the existing statute.

Now in order to show that absurd consequences would follow from the 9th section being held to apply to every case, reference was made to the provision that the width of the gap in its narrowest part should not be less than one-tenth of the width of the stream—which, if the weir only went across part, might make the gap as large as the old weir—and therefore that

(1) Ir. R. 2 C. L. 514.

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weirs which did not extend the whole way were still understood to be excepted as in the 41st section. But I would take it that the true construction of the clause was that "width of the stream" meant width of the stream which was covered by the weir, and was the same thing as one-tenth of the width of the weir itself. If this argument were allowed to prove that weirs which did not go across half the river were to have no gap, the same inconvenient result would still remain as to weirs that exceeded one half the river in length by an amount however small, to which the 9th section undoubtedly must apply. Also, that consequence was no less necessary under the 41st section as to all the weirs exceeding one-half, because, as to them, there was no proportion between the gap and the weir; but in like manner, as under the 9th section, between the gap and the river. However, even if the conclusion were unavoidable, that width of the stream must mean the whole stream, whatever the size of the weir was, I would still consider it necessary to hold that the exception could not be preserved, whatever consequence followed, against the obstacle of the general words "every fishing weir," and the fact that provision was made for every other point that was the subject of section 41. If the question was, whether the use of those general words was to be taken as a proof that the Legislature had found reason to change its mind, and to allow no exception of weirs, however short, an apt example could perhaps be found in the case we have to deal with, in which there are two weirs running from each side, fulfilling separately the conditions of the 41st section, but virtually continuous, and in the direct line at all events blocking the whole stream. It may be the reason for the opinion of the Inspectors, which I gather not to have been adverse to the defendants, that the space by which the two are divided serves the purpose of a Queen's gap, so as to afford a way for the passage of the fish, which their instincts would cause them to seek, without any other opening, though this view may not take sufficient account of the destruction that may be caused to the young fish coming down; and I take it that the parties, who know their own business best, the owners of the eel weirs on the one hand, and of the salmon fishery on the other, are not contending for nothing, but con-

sider they have a real interest at stake in this dispute. However, whatever may be the view of the Inspectors, if the law says there shall be a gap, a gap there shall be. I think it likely that the true and real account of the words in the 9th section is this. The framers of the Act, there is no doubt, were thinking chiefly of salmon. Salmon weirs are of no use unless they go across the whole river, otherwise the fish would pass them by; that is not the case of eels, which come blindly tumbling down in bundles by the force of the stream. The words therefore which were used in the 9th section had reference to the object which was immediately in the mind of the Legislature, but did not exclude eel weirs from the necessity of a gap any more than they were excluded by the Act of 5 & 6 Vict., which extended to all weirs "for catching of salmon, eels, and other fish" when not within the limit of distance.

However there is an argument which, even if capable of a double use, admits of being employed to prove that weirs not exceeding half the river were not intended to be comprised in section 9. For that and the succeeding section are copied in all other respects from the English Salmon Fishery Act of 1861, with the important difference, however, that the corresponding section of that Act is expressly limited to weirs which do go across half the river. That would be a very strong argument standing by itself, that the change of words in section 9, "every fishing weir," was the result of a change of intention, but for the escape from the difficulty lying in the direction of section 41 of the Act of 5 & 6 Vict., as an enactment that contained the same limitation and still subsisted. This, however, would make it necessary to substitute for the words "every fishing weir" "every fishing weir which shall exceed half the breadth of the river." The argument fails altogether since the Statute Law Revision Act of 1892, unless we yield to the contention of the restricted sense still adhering to it as the result of its temporary association with section 41.

We were referred by Mr. Fitzgerald—in an argument, that ought not to pass unnoticed for the great assistance it gave the Court in a masterly survey of a very extensive question—to several rules upon the construction of statutes, one of which

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was stated from a text writer, that one ought to adopt the construction which will involve a minimum of change. I do not assent to this proposition, which I regard merely as one of those instances of novelty of expression affected by text writers in the statement of principles not new, except so far as it is a branch of the general rule of interpretation that the new law and the old law are to stand together where they are consistent and where there is no reason to conclude the contrary was the intention. We are to go in upon the existing law, just as far as the policy and the words of the amending statute carry us, whether it be a minimum or maximum. The passage quoted from *Minet* v. *Leman* (1), "that the general words of the Act are not to be construed so as to alter the previous policy unless no sense or meaning can be applied to those words consistently with preserving the existing policy untouched," is merely the argument of counsel, to which the Master of the Rolls gives a general assent without applying it to the particular case, in which he gave effect in the event to general words; and it begs the whole question, as it leaves open the intention, which there is no mode of collecting except from the words of the statute. Here we have to deal with the meaning of language contained in the section of an Act that displaces bodily the whole of a previous enactment, substitutes other provisions for the same object, and in terms enlarges the subject to which it applies. All these circumstances, however, are considered to exist likewise in the English Fishery Act of 1861, in which nevertheless the same general words "fishing weir" were allowed in *Rolle* v. *Whyte* (2), cited by Mr. Fitzgerald, to have the meaning of weir extending more than half the way across the river. But the difference in the case of the two Acts is manifest. Section 12 of the English Act says that "no fishing weir, although in use at the time of the passing of the Act shall be used for the purpose of catching salmon unless it have such free gap as hereinafter mentioned." But when we come to find what is the free gap "hereinafter mentioned," we find it is confined to "weirs which extend more than half way across the river."

Now, what distinguishes that case is this, that the words are

(1) 20 Beav. 278. (2) L. R. 3 Q. B. 286.

found in the same Act, not in Acts passed at different times, and therefore cannot admit the presumption of an alteration in the intention of the Legislature—that one section expressly refers to the other—that the words "no fishing weir" are not general words standing alone, but qualified in their use by the object of excluding any distinction in the case of weirs already existing—and that "such free gap as hereinafter mentioned" means not only the description of a free gap, but a free gap in weirs of the size which is required by sect. 27, namely, those which go beyond more than half the river. To the general conclusion on the other hand which this decision is supposed to warrant, Mr. Atkinson, for the complainant, opposed the case of *Parker* v. *Pim* (1), in which it was sought to carry a distinction between broad and narrow rivers, found in the 5 & 6 Vict., in reference to the prohibition of fishing, into the later Act of 13 & 14 Vict., in which general words were used without distinction; and the Court decided against that construction while professing to be unable to assign any satisfactory reason for the difference of the language in the two instances. The posterior statute must always of necessity give rise to a presumption of altered intention in the Legislature unless it is clearly displaced. The late case of *Wylie* v. *Moffat* (2), cited by Mr. Atkinson, on the construction of the Married Women's Property Act, 1893, is another example of the effect which must be assigned to general words. Undoubtedly it is a very strong circumstance that the law must be held to be different in Ireland from what it is in England on precisely the same subject—that section 9 of the Irish Act, in all the words and particulars concerning the free gap, is an exact copy of the English Act of 1861, which, however, is expressly limited to exclude weirs that do not extend beyond half the river, as it was limited in the Irish Act of 5 & 6 Vict., from which in like manner in all probability the limitation was taken. And this circumstance gives rise to grave doubts as to whether it was not really intended that the rule as to the size of the weir should still continue, and whether the general words were not owing to inadvertence, or to the idea that the provision as to size in the former Act would

(1) Ir. R. 3 C. L 572 (2) [1895] 2 Ch. 116.

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still be in force, and this argument, which would assume great gravity if the 41st section were not now expressly repealed, is the stronger for the reason that the ground of the objection to the want of the gap, in weirs of less size than the whole river, is not that which at all gave rise to the free gap originally—the obstruction of fish in ascending the river—but the destruction of the young fish in coming down. If it were consistent with the rules of law that the English Act could have been read together with the Irish, the identity of the provisions in sections 9 and 27 would be an almost conclusive argument that section 41 of the 5 & 6 Vict., was still to be the provision corresponding to that in section 27, as to the size of the weir. However, the express repeal of section 41 by the Statute Law Revision Act, removes that argument entirely out of the way, unless we adopt Mr. Fitzgerald's contention, which I do not see we can, that the restricted meaning was so established in section 9 during the existence of section 41, that it still remains attached to it after the repeal. We have therefore nothing remaining but the general words "every fishing weir" in the only statute that now exists concerning a free gap, and I consider we cannot refuse to those words their natural extent of meaning.

I am therefore of opinion we must answer the formal question by stating that the Justices were wrong in their determination, and remit the matter to them to proceed according to law. I would certainly have wished that another mode was found of trying the question of so great importance and affecting wide and large interests, which would admit of our opinion being considered by another tribunal, but a proceeding for penalties is an ordinary mode, and it is not easy to see another or convenient mode—and it is the mode presented to us for adjudication.

JOHNSON, J.:—

Shortly stated, the facts are that, before and at the time of the commencement of the 26 & 27 Vict. c. 114, and ever since, the defendants were and have been the owners of these two eel weirs; that, from that time to the summons in December last, there never was a free gap in either of these weirs, both of which have always been exclusively used for catching eels; and that

neither of the weirs extend halfway across the river. On these facts it is contended for the complainants that the defendants ought to have been convicted under the provisions of the 26 & 27 Vict. c. 114, and, for the defendants, that the summons was properly dismissed on the grounds—first, that that Act does not apply (*a*) to weirs which do not extend halfway across the river, or (*b*) to eels; and secondly, that the prosecution for the offence (if any) ought to have been brought within six months after the commencement of the Act of 1863, or that the offence (if any) is not a continuing one. The principal Fisheries Act in Ireland, 5 & 6 Vict. c. 106 (1842) was passed "to consolidate and amend the several Acts now in force in Ireland relating to the fisheries thereof," and it repealed the former Acts and contained enactments in reference to all kinds of fish including salmon, trout, and eels. Sections 31 and 34 deal with eels; section 37 with the removal during close seasons of contrivances for the capture of salmon and eels; and section 41 provides for a free gap or Queen's share from and after 1st January, 1843, in all "standing weirs, dams or dykes of what nature or kind soever which extend more than half way across any river at the lowest state of the water thereof . . . for the purpose of catching salmon, eels, and other fish," and prescribes the position, size, and formation of the gap; but these provisions were practically neutralised by the subsequent provisions of the same statute requiring compensation to the weir owner before his weir could be interfered with, without providing means for obtaining such compensation so to be paid. In 1850 the 13 & 14 Vict. c. 88, section 22, empowered the Fishery Commissioners without compensation to make a free gap where any person, not by law exempted from the obligation of making or maintaining it, omitted or neglected to do so; and sections 23, 24, 25, and 26 further empowered the Commissioners to enforce a free gap where the weir owner was not compellable to make or maintain one—when the persons putting the Commissioners in motion secured to the satisfaction of the Commissioners the costs of all the proceedings. It also empowered the Commissioners to assess the amount of compensation to be paid to the weir owner, with power of appeal to the Judge of Assize. These provisions also proved ineffectual to secure the free gap. Then, in 1861, was passed for England the 24 & 25

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Vict. c. 109, which deals only with salmon fisheries, and sections 27 and 28 (to which we were referred) provide for a free gap where any fishing weir (*i.e.* by section 4, a dam used for the exclusive purpose of catching or facilitating the catching of fish) extends more than half way across any stream at its lowest water.

So far, the legislation as to free gaps both in Ireland and England was limited to weirs or dams extending more than half way across the river. Then came the 26 & 27 Vict. c. 114, "to make further provisions for carrying into effect the law relating to the salmon fisheries in Ireland," which, by section 44, is to be construed, "so far as is consistent with the tenor thereof," with the Acts relating to salmon fisheries in Ireland commencing with the 5 & 6 Vict. c. 106. Section 7 requires the Commissioners appointed under the Act to "inquire into the legality of all fishing weirs throughout Ireland." A fishing weir is, I apprehend, a weir to catch fish; and section 9 provides—"In every fishing weir" (a more comprehensive expression than the "standing weir, dam, or dyke," of the Act of 1842) "there shall be a free gap or opening in accordance with the regulations following under the powers of this Act . . ." Then follow provisions practically the same as those in section 41 of the Act of 1842, and the section proceeds —"No person shall be entitled to any compensation by reason of the enforcing of any free gap in any weir, anything to the contrary in any Act notwithstanding"; and section 12 prescribes the rules "for the purpose of enforcing efficient free gaps in fishing weirs."

It was argued that the provisions of section 9 were adopted from the English Act; but the English Act is limited to "any fishing weir extending more than half way across any stream," and the extreme width of the gap is limited to 40 feet. Section 9 of the subsequent Irish Act applies to "every fishing weir," and the extreme width of the gap is limited to 50 feet. The Irish Act is more far-reaching than the English Act; and I see no solid ground for construing the expression "in every fishing weir," in section 9 of the statute of 1863, which was "to make further provisions," to mean in such fishing weirs only as are mentioned in section 41 of the Act of 1842. If that was the intention of the Legislature *quod voluit non*

dixit, and it is certainly contrary to the view expressed by George, J., in *Devonshire* v. *Foolt* (1). A similar argument was rejected in *Parker* v. *Pim* (2); and now section 41 of the Act of 1842 has been repealed by the Statute Law Revision Act, 1892, leaving Queen's gaps to be dealt with under the Act of 1863. If the Act of 1863 had merely intended that the provisions of section 41 of the Act of 1842 should be carried into effect without compensation, this might have been accomplished by a few apt words, and it would have been unnecessary to repeat those provisions in the Act of 1863; and the repeal of section 41 of the Act of 1842 by the Statute Law Revision Act of 1892 must, I think, have been because it had ceased to be operative, having been impliedly repealed and superseded by the provisions of the Act of 1863.

Next, it was argued that eels were not within the scope of the Act of 1863, which dealt with salmon and trout only; but section 41 of the Act of 1842 dealt with eels as fish which might be captured by a fishing weir, and provided that there should be a Queen's gap in every standing weir or dam for catching eels if it extended more than half way across the river; section 77 of the same Act recognises the possibility of catching salmon and trout, and the fry of salmon and trout, in an eel weir, and makes it penal to do so. The professed policy of the fishery code is to secure the free passage and migration of salmon with a view to their increase; and, now that section 41 of the Act of 1842 is repealed, if the Act of 1863 does not (as the defendants argue) apply to eels, the result would be that there would now be no statutory provision requiring a Queen's gap in any eel weir, no matter what its extent.

Lastly, it was contended that this offence (if any) was completed when twelve months had elapsed after the commencement of the Act of 1863, and that the penalty could not be recovered after six months from the completion of the offence. In support of this contention was cited *Marshall* v. *Smith* (3). This was a decision on a bye-law, which was afterwards considered in *Rumball* v. *Schmidt* (4), which shows, in principle, that, where an enactment makes it an offence not to do a specific act within a specified time, and also provides a penalty for every day during which the offence

(1) Ir. R. 2 C. L. 514.
(2) Ir. R. 3 C. L. 572.
(3) L. R. 8 C. P. 416.
(4) 8 Q. B. Div. 603.

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is continued after the specified time, then in that event the offence continues daily, and a penalty is recoverable daily in respect of it so long as the offence continues.

SIR P. O'BRIEN, L.C.J. :—

The plaintiff must get his costs.

Solicitor for appellant: *F. Fitt.*
Solicitor for respondents: *Wm. M. Lane.*

A. E. R. J.

Appeal. 1895. Nov. 19, 20, 25.

MANLY *v.* YOUNG (1).

(1894. No. 4589.)

Local Government—Rates—Township Commissioners—Urban sanitary authority—Public Health (Ireland) Act, 1878 (41 & 42 *Vict. c.* 52), *sects.* 226, 227—*Towns Improvement (Ireland) Act*, 1854—*Special Act—Limit on rate—"Sanitary Acts."*

Town Commissioners, acting under a Special Act, which incorporated the Towns Improvement (Ireland) Act, 1854, the Gasworks Act, 1847, and certain provisions of the Waterworks Clauses Act, 1847, were also the Sanitary Authority of the township. The Special Act provided that the township rate should not exceed in any year 2*s.* in the pound without the consent of two-thirds of the rate-payers at a special general meeting. The Commissioners, without the prescribed consent, made a township rate of 2*s.* 6*d.* in the pound, not only for sanitary purposes but for all the purposes of the Special Act :—

Held (affirming the judgment of the Exchequer Division), that the rate was bad.

APPEAL by the plaintiff from an order of the Exchequer Division, dated June 28, 1895, declaring the rate struck by the Pembroke Township Commissioners for 1894, to be bad.

The facts appear fully in the report of the case in the Court below—[1895] 2 I. R. p. 676.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L. JJ.

Matheson, *Q.C.*, and *Meredith*, *Q.C.* (with them *A. F. Blood*), for the appellant. *Appeal.* 1895.

Serjeant Dodd, and *Rynd*, for the respondent. MANLY v. YOUNG.

Cur. adv. vult.

LORD ASHBOURNE, C. :—

Nov. 25.

This is an appeal from the Exchequer Division, on a special case, holding that the Pembroke Township Rate for 1894 was bad, and could not be enforced.

The action was brought by the plaintiff, as Clerk and Secretary of the Pembroke Township, to recover £22 1*s.* 9*d.* for rates due by the defendant.

The defendant disputes so much of the demand as consists of the Pembroke Township rate on the ground that the said rate is made under section 46 of the Pembroke Township Act of 1863, which provides that the Township rate shall not exceed 2*s.* in the pound in any year without the consent of at least two-thirds of the ratepayers, which consent was not given. The plaintiff, however, insists that by reason of sections 226 and 227 of the Public Health Act, 1878, and by the definitions contained in section 2 of that Act, the provision contained in section 46 of the Pembroke Township Act, 1863, has ceased to have any operation or effect.

By section 226 of the Public Health Act, 1878, it is enacted that all expenses incurred or paid by the Urban Sanitary Authority in the execution of the Act and not otherwise provided for, shall in the case of Commissioners under a local Act, or being an Urban Sanitary Authority, be defrayed out of any rate leviable by them as such Commissioners throughout the whole of their district. By section 227 it is provided that any limit imposed on or in respect of any rate by any Act of Parliament shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by the Sanitary Authority of an urban sanitary district for sanitary purposes. By section 2, "sanitary purposes" are defined to mean any objects or purposes of the Sanitary Acts; and by the same section "Sanitary Acts" are defined to mean certain Acts therein

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mentioned and, amongst others, the Towns Improvement Act of 1854, and with respect to any urban sanitary district are defined as including any Act or local Act relating to the same subject-matter as the Acts therein above mentioned in force within the district.

The Pembroke Township Act, 1863, relates to the same subject matters as the Towns Improvement Act, 1854, and others of the Acts in the said schedule mentioned; and the plaintiff accordingly argues that the impeached rate is a rate levied for the purpose of defraying expenses incurred for sanitary purposes within the meaning of the foregoing provisions of the Public Health Act, and that therefore the limit imposed by section 46 of the Pembroke Township Act does not apply to the said rate.

This claim involves an unlimited power of taxation and must be jealously scrutinized and clearly established before it can be legally affirmed.

It appears to be opposed to the whole current of legislation relating to local government and taxation. In Act after Act, down to the present time, the principle of stating a limit to the power of taxation vested in local authorities is asserted. In rating for sanitary purposes an exception was needed in consequence of the vital importance of the public health and to enable local authorities to cope with, it might be, deadly and imminent perils to life. Accordingly, section 227 of the Public Health Act provides that limits in rates shall not apply to any rate required to be levied for defraying any expenses incurred by the *sanitary* authority of any urban *sanitary* district for *sanitary* purposes. The Act was solely conversant with public health. Sanitary purposes were solely under the consideration of the Legislature in passing the Public Health Act. There is not a section of the Act to show that the Legislation were dealing with any other purposes. The plaintiff, however, argues that on its true construction an unlimited power of taxation, for purposes other than sanitary, was effected by the Public Health Act—a measure passed to consolidate and amend the Public Health Acts. Nothing but the clearest words would justify assent to the contention of the plaintiff. I concur with Mr. Justice Andrews in thinking it "extravagant," and with the Lord Chief Baron in regarding it as "hopeless."

Sections 226, 227, and 228 are practically a code complete in themselves, and I see nothing in the definitions contained in section 2 to interfere with their obvious and natural construction. I accept the judgment of the Lord Chief Baron on the meaning of the definition "Sanitary Acts," and if the definition could be interpreted in a wider sense I should be disposed to regard it as inconsistent with the context of those sections, and therefore should not feel hampered by it.

Really according to the argument, if all purposes are included in "sanitary purposes" and if no special meaning is to be given to the word "sanitary" it is difficult to know why section 227 was inserted. If, in the true construction of the Act, limits for purposes other than sanitary were swept away, why, in section 227, is it specially enacted that limits should not apply to rates levied for sanitary purposes? Again, why in section 228 is it enacted that the amount of any assessment under the Towns Improvement Act, 1854, may notwithstanding any limitation in the section with respect to water amount to, but shall not exceed, 2*s.* in the £, if by previous sections and the definitions all limitations had been already dealt with, and all the purposes of the Towns Improvement Act were included in the definition of "sanitary purposes"?

In my opinion the judgment of the Exchequer Division was right, and this appeal should be dismissed with costs.

FITZ GIBBON, L.J.:—

I concur. Premising that, under the express words of the definition clause, it is to be applied only where the defined meaning is not inconsistent with the context, and that I think the plaintiff's contention as to the meaning of the words "sanitary purposes" in section 227 is inconsistent with section 226, and therefore with the context, I agree with the Lord Chief Baron as to the true construction of the definition clause, which equally disposes of the plaintiff's argument. "Sanitary Acts" means, *first*, "all the above-mentioned Acts," *i.e.* certain specified Acts relating to lodging-houses, artizans and labourers dwellings, bakehouses, diseases prevention, baths, and wash-houses, which are but a very limited selection from the varied subjects of sanitary legislation; *secondly*, "the Acts mentioned in the Sche-

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dule A to this Act annexed, except the Burial Grounds Acts"; *thirdly*, "any amendments of *such Acts* contained in this or any other Act"; and, *lastly*, "with respect to any urban sanitary district, includes any Act, local Act, or provisional order relating to the same subject matters as *the above-mentioned Acts* in force within such district."

I can not accept the construction of the words "above mentioned Acts," where they last occur, which seems to have recommended itself to Mr. Justice Andrews, and which would restrict the last clause of the definition to the few special subject-matters of the departmental Acts mentioned above. That is not the natural or grammatical sense of the definition; and I hold with the Lord Chief Baron that it must include all the subject matters of "the Acts mentioned in Schedule A" as well as those of the named Acts previously mentioned. But I read "the Acts mentioned in Schedule A" as equivalent to "the enactments —*i. e.* the Acts or parts of Acts—mentioned in Schedule A as repealed." This gives a natural and definite meaning and effect to the words "Sanitary Acts"; it limits them to legislation, past or present, which relates to sanitary matters, and with respect to urban districts it brings into the definition so much only of the local Acts as relates to "the same subject-matters": that is to say, the whole local Act is not turned by this definition into a sanitary Act, but such only of its provisions as relate to public health are classified and identified with the general Acts relating to sanitation.

Schedule A is mentioned in section 294—"The Acts *specified* in the first and second columns of Schedule A to this Act are hereby repealed, to the extent in the third column of that schedule *mentioned*." If the definition clause had referred to the Acts mentioned in the third column of Schedule A, or to "the Acts affected by Schedule A," or even to "the Acts mentioned in the several columns of Schedule A," the argument of the plaintiff would have been at once displaced. And in my opinion the phrase in the definition clause means, "mentioned in the Schedule *for the effective purpose of the Schedule*," namely for the purpose of repeal. The head note to the Schedule itself supports this view. "Enactments which have been already repealed are in a few instances

included in *this repeal.*" The third column alone is operative, and it is a specification of enactments, all of which deal exclusively with strictly "sanitary purposes." When we look at the cases of partial repeal in the third column, we find eleven sections of "The Towns Improvement Act, 1854," and two sections of "The Local Government Board (Ireland) Act, 1872." If we refer to these repealed sections as they stand in the original Acts, we find them to be sections dealing with strictly sanitary matters, and occurring among other sections dealing with what I may call the non-sanitary purposes of urban authorities—for example, sections 8 and 9 of the Act of 1872 are immediately followed by a section relating to markets. Is it conceivable that because markets are among the subject-matters of "The Local Government Board Act, 1892," the mention of sections 8 and 9 of that Act in Schedule A of the Public Health Act of 1878, turns the markets in the Pembroke Township into "objects or purposes of the Sanitary Acts" within the definition in question. Yet that is the plaintiff's contention.

Both in the definition clause and in all the other provisions of the Act, I read "sanitary purposes," therefore, as confined to purposes relating to the Public Health, and I rest my judgment upon the grounds which the Lord Chief Baron has stated. I hold the Public Health Act of 1878 to be a piece of strictly sanitary legislation: sanitary matters only were present to the mind of its draftsman, and of Parliament, in framing it, and I interpret its language accordingly.

But, if necessary, I should hold that "sanitary purposes" in section 227 is, *upon the context*, limited to purposes relating to Public Health, and to the purposes of the Public Health Act itself. Sections 226 and 227 are connected with each other. Section 226 provides that "all expenses incurred ... by an Urban Sanitary Authority *in the execution of this Act* ... shall be defrayed" out of the specified rate. Then section 227 provides that "any limit imposed on ... any rate ... shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by the sanitary authority ... for sanitary purposes." I hold that section 227 removes the limit only for the purposes of section 226, and as section 226 deals only with "expenses incurred in the execution

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of this Act," the limit is removed by section 227 only where, and so far as, such expenses have to be defrayed. Section 228 also appears to me to be inconsistent with the plaintiff's contention, for if all expenses under the Towns Improvement Act, 1854, were "expenses for sanitary purposes" under section 227, the limitations imposed by section 60 of that Act would already have been removed by section 227, as the Towns Improvement Act is one of the "Acts mentioned in Schedule A," and is therefore, if the plaintiff be right, one of the "Sanitary Acts" as defined by the Act of 1878.

I may point out just one instance, out of several, where the words "Sanitary Acts" are used in the strict sense of the interpretation clause, including as well repealed as still operative Acts. In section 237, "Expenses incurred in the execution of the Sanitary Acts or of this Act," and "loans contracted under the Sanitary Acts or this Act" plainly include past expenses and loans incurred under Acts which may have been repealed, and for which the Act of 1878 may have been substituted. I mention this only to show that the definition, however objectionable in other respects, may have its own proper and convenient use.

To sum up—I am of opinion, that whenever the Pembroke Commissioners seek to levy a rate which exceeds the limit imposed by their local Act, they must either have the sanction of the prescribed *plebiscite*, or they must show upon the face of the rate that so much of it as is in excess of the limit is required to be levied for the purpose of defraying sanitary expenses properly so called.

BARRY, L.J.:—

I concur. I shall not, after the exhaustive judgments of the Lord Chancellor and Lord Justice Fitz Gibbon, go into the details of the Acts of Parliament cited. This is a typical case exemplifying the inconvenience of the present mode of drafting Acts of Parliament. In the whole range of drafting there is hardly a finer specimen of confusion than is furnished by the Public Health Act in its definition clause, and its schedule. Indeed counsel during the argument had to admit that the

whole embarrassment in construing the sections cited, was caused by the definition!

I own that I would find some difficulty *a priori* in following the judgment of the Exchequer Division in the interpretation they have placed on the definition of "Sanitary Acts." But whatever may be the proper mode of explaining this extraordinary definition, I take the broad view that it is impossible that the Legislature intended to confer by it alone on a sanitary authority like the Pembroke Township Commissioners an unlimited power of taxation in contradiction to the whole course of previous legislation.

WALKER, L. J.:—

The contention of the appellants and its far-reaching consequences have been stated by the Lord Chancellor, and I shall not repeat them.

Before approaching the interpretation clause of the Public Health Act it is desirable to arrive at a clear view of the construction of the words "sanitary purposes" themselves where they occur in the sections of that Act grouped under the heading, "Expenses of Urban Sanitary Authority."

The Pembroke Township Local Act incorporates with it the Towns Improvement Act, 1854, save so far as expressly varied, and the Public Health Act (sect. 4), constitutes the Pembroke Township Commissioners the "urban sanitary authority." The determination of the question in the case will be aided by considering the extent of the rights, powers, and duties which the Commissioners by virtue of such incorporation, and on the true construction of the Public Health Act took over and assumed as the "urban sanitary authority."

The Towns Improvement Act contains sanitary provisions, and also many, which have no connection with sanitation. Sewerage and drainage are dealt with in sects. 33, 34, and 35. The cleansing of streets, prevention of nuisances, and prevention of smoke, are the subject of the 42nd section. Lodging-houses are dealt with by sections 45 and 46; so also provisions relating to the sale of unsound food are contained in sections 44, 48, and 49, while sections 52, 53, and 54 are conversant with the supply

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of water. Those are all included in the sanitary provisions with which the Public Health Act deals. The 60th section authorizes the levy of a public assessment for general purposes, not exceeding where the enactments with respect to water are adopted, 1*s.* 6*d.* in the pound.

The Pembroke Township Act, 1863, which incorporates the last-mentioned Act itself, contains many sanitary provisions, and many which are not such, and it authorizes, in substitution for the assessment mentioned in the 60th section of the Act of 1854, the levy for all the purposes of the local Act of a rate, not exceeding, save under certain conditions which have not been complied with in this case, 2*s.* in the pound. It also provides for the levy of a special water rate not exceeding 1*s.* in the pound.

The Public Health Act in the first place creates sanitary authorities (*a*) urban, and (*b*) rural: it then proceeds (sect. 8) to invest the urban authorities with all powers and duties attaching to the urban authority under the Act, and in addition thereto those attaching to the local authorities under the Bakehouse Regulation Act, Artizans and Labourers Dwelling Act, Baths and Wash-houses Acts, Labouring Classes Lodging Houses Acts, and also all powers and duties *under the Local Act "for purposes the same as or similar to those of"* the Public Health Act. Thus the Pembroke Township Commissioners as the urban authority become invested with the powers and duties exercisable by or attaching to them under the Public Health Act, and with all the powers in their local Act which exist for purposes "the same or similar"; while any rights or powers which, *plus* those here mentioned, they have in their capacity of Pembroke Township Commissioners, remain in them in that capacity.

It is not unimportant to note this ideal severance when we come to consider whether the Legislation which provides for their expenses in one capacity takes away all limits of taxation in their other capacity.

Part II. of the Public Health Act contains "sanitary provisions." They are numerous and include, *inter alia*, provisions relating to all those matters which I have mentioned as forming part of the subject-matters of the Towns Improvement Act.

Part III. contains provisions relating to "burial grounds." Part IV. contains "general provisions," and then comes the portion of the Act on which the question in this case has arisen, Part V., headed "Financial—Expenses of Urban Authority." I forbear from reading sect. 226 again. It is obvious that the phrase "expenses incurred in the execution of this Act" means the expenses of carrying out the sanitary provisions in Part II. Expenses *qua* Burial Board, under Part III., are provided for by a separate rate under section 234. The expenses are paid out of the general assessment.

Then comes the proviso:—"Provided also, that where an urban sanitary authority had, before the passing of this Act, power to levy throughout the whole of its district a rate or rates for paving, sewering, or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under this Act shall be defrayed out of such rate or rates except where, at the passing of this Act, any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable." If there is a sanitary rate existing it shall be dedicated to the purpose of paying for the carrying out of the sanitary provisions. But what is the meaning of the words—"paving, sewering, or other sanitary purposes"? Such a rate cannot be the same as that mentioned earlier. It is introduced by a proviso. Both may exist as separate.

We have here in section 226 itself the words "sanitary purposes," in a collocation which leaves no doubt as to their meaning. What meaning then are they to receive in section 227? —the very same words introduced for a like purpose. It must be the same as mentioned in the proviso, and where the object exists the limit is removed.

It is said all limit for general assessments is taken away by the effect of section 227, but what then is the meaning of section 228, which raises the statutory limit for general assessments in the Towns Improvement Act from 1*s.* 6*d.* to 2*s.*, when the provisions with respect to water have been adopted, and leaves the limit (now argued to be removed) at that figure of 2*s.*?

In my opinion we have in those sections a meaning of "sanitary purposes" which is natural and true and which the plaintiff's con-

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tention would turn into unnatural and untrue. Are we coerced to such a conclusion by the interpretation clause? I see no difficulty in reading "Sanitary Acts," in the definition in the sense in which the Chief Baron has read them, and I adopt his judgment altogether on the point and cannot usefully add anything to it.

If this were not so I am prepared to hold that the plaintiff's construction is entirely inconsistent with the context of sections 226, 227, and 228, and the whole scope and object of the Public Health Act, and therefore that we are at liberty to read the words "sanitary purposes" in their natural and true sense without regard to the interpretation clause.

Solicitors for the appellant: *D. & T. Fitz Gerald.*
Solicitor for the respondent: *James Goff.*

G. Y. D.

Q. B. Div. 1894. Nov. 8, 9, 17. 1895. Jan. 22. *Appeal.* April 25. May 18.

M'DONNELL *v.* BRODERICK (1).

(1893. No. 10,748.)

Statute of Limitations—Common Law Procedure Amendment Act (Ireland), 1853 (16 & 17 Vict. c. 113, s. 20)—Arranging debtor—Assenting creditor—Failure to pay composition—Action for original debt—Implied promise to pay.

A debtor carried an arrangement with his creditors, whereby his creditors were to accept a composition for their debts, payable by instalments. The first of these instalments was not paid. Five years afterwards the plaintiff, an assenting creditor who had proved in the arrangement (a period of more than six years having elapsed since his debt originally accrued), commenced an action for that debt:—

Held, by the Queen's Bench Division (Harrison and Gibson, JJ., *diss.*, and Gibson, J., withdrawing his judgment), and by the Court of Appeal, that the plaintiff was entitled to judgment; that there was implied in the arrangement a promise on the part of the arranging debtor that, in case he failed to pay the composition at the time agreed, he should pay the entire debt.

(1) In the Queen's Bench Division before HARRISON, O'BRIEN, JOHNSON, and GIBSON, JJ.

NEW TRIAL MOTION. The action was tried before Mr. Justice Holmes, without a jury at the Easter Sittings, 1894. It was brought to recover £136 12*s.* 1*d.* for goods sold and delivered. There were several defences pleaded and a counterclaim; but this last was abandoned and the defence relied upon was the Statute of Limitations.

The writ was issued on the 28th October, 1893, claiming £136 12*s.* 1*d.* for butcher's meat supplied between September, 1883, and July, 1887, £200 16*s.* 10*d.*, less payments on account £59 10*s.*, and an allowance of £4 14*s.* 9*d.* It was admitted that these payments on account were made prior to July, 1887.

As an answer to the plea of the Statute of Limitations the plaintiff relied on certain proceedings in bankruptcy instituted by the defendant, as an arranging debtor. It appeared from the file of the Court of Bankruptcy which was produced on the new trial motion, that on the 15th November, 1887, the defendant filed a petition in bankruptcy as an arranging debtor. The first sitting was fixed for the 6th December, and protection given to the person and property of the defendant until that date. The sitting was postponed and the protection enlarged until the 20th December. On the 16th December the plaintiff filed his verified proof of debt (for the sum now sought to be recovered) and appointed the debtor's solicitor to act as the plaintiff's proxy at the several sittings. On the 20th December the first sitting was further adjourned, and the protection extended to the 6th January, 1888, when the first sitting was held. At this sitting, debts, including the plaintiff's, were admitted, and the protection further extended to the 27th January, which was appointed for the second sitting. On the 27th January the Court of Bankruptcy approved and confirmed the debtor's proposal of a composition of 5*s.* in the £ payable by four promissory notes of the defendant at three, six, nine, and twelve months from that date. The defendant's person only, not his property, was further protected to the 30th April being the day on which the first note would become payable. On the 13th March it was ordered that the notes should be transmitted to the creditors, and accordingly four promissory notes for £8 10*s.* 9*d.* payable on the 27th April, 27th July, 27th August, 1888, and 27th January, 1889, were given to the plaintiff. The

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first and other notes were presented as they fell due and were dishonoured.

In his account and statement of affairs, filed in the arrangement by the defendant before the first sitting, the defendant had returned the plaintiff as a creditor for the amount now claimed.

The learned Judge, after hearing argument on both sides and having taken time to consider, gave judgment in the following terms :—" In this action all the defences except that of the Statute of Limitations have been withdrawn and the counterclaim has been abandoned.

" The original cause of action accrued more than six years before the issue of the writ, and the plaintiff relies upon an arrangement by the defendant under the Irish Bankruptcy Act within that period to take the debt out of the statute, or rather to substitute a new debt for the old one. The defendant carried an arrangement under the Court by which his proposal to pay a composition to his creditors secured by promissory notes was confirmed, and notes of the composition on the debt now sued on were received by the plaintiff. These notes were, however, dishonoured when they came to maturity, and the composition has not been paid.

" Under these circumstances, Mr. Campbell argues on the authority of *Slater* v. *Jones* (1) that the arrangement, coupled with the acceptance of the bills by the plaintiff, put an end to the original debt, subject to an implied promise by the debtor that in case he failed to pay the composition in the manner agreed upon he would pay the whole debt. I think that the pleadings as they stand are sufficient to entitle the plaintiff to make this case; and, if not, as there is no suggestion of surprise, I should be willing to allow any amendment that might be required. *Slater* v. *Jones* (1) arose under the 126th section of the English Bankruptcy Act, 1869, and the mode of composition thereby provided differs in details and machinery from an arrangement under sections 343 and 352 of the Irish Statute of 1857. In the one case it is carried out by the creditors themselves, in the other it is under the control of the Court, and there is necessarily considerable difference in the language of the respective provisions; but after careful consideration I

(1) L. R. 8 Ex. 186.

have come to the conclusion that the essential features and the effect of the two proceedings are identical, and if there is no authority to the contrary I am prepared to follow *Slater* v. *Jones* (1).

"Mr. Carton, however, says that there is such an authority in the case of *Kennedy* v. *Blackburne* (2), and that it is there decided that an arrangement is no bar to an action on the debt unless and until a certificate is produced, and that up to that time the debt can be sued on and judgment obtained, although promissory notes for the composition still current have been received by the creditor, and even after the amount of the composition has been actually paid. Now if there is such a decision on the Irish Act by the Court of Queen's Bench, much as I might dislike it, I should feel myself bound to follow it, and to hold in this action that inasmuch as the original debt could have been sued on at any time, Mr. Campbell's argument founded on *Slater* v. *Jones* (1) does not apply. But is there such a decision? There is no doubt a great deal in the reasoning of Mr. Justice O'Brien's judgment in *Kennedy* v. *Blackburne* (2) going the full length contended for by Mr. Carton, but Mr. Justice Fitz Gerald was very guarded in his language. In that case the plaintiff had not merely not assented to the arrangement but had strongly opposed it and had refused to accept payment of the composition. Fitz Gerald, J., calls attention to this fact, and says expressly that if the plaintiff had taken the money the case might have resulted differently, not by reason of the provision in the statute but in consequence of the creditor's own act. In the case before me it does not appear whether the plaintiff voted for or signed the resolution. I asked the question, but there were no materials in Court for answering it.

"It also appears, however, that he proved his debt and took the notes. In *Smith* v. *Simmonds* (3) a similar question to that in *Kennedy* v. *Blackburne* (2) arose, and the marginal note to the report states that the previous cases was followed and approved. But how was it understood, and to what extent was it followed? Admittedly there was no certificate; and if Mr. Carton's view is right that ought to have disposed of the case. But it did not

(1) L. R. 8 Ex. 186. (2) 11 Ir. Jur. (N. S.) 388. (3) 8 L. R. Ir. 357.

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dispose of it. By consent of the parties, the proceedings in the Bankruptcy Court were referred to, from which it appeared that the plaintiff withdrew his proof, and did not receive any notes for the composition. Morris, C. J., says:—'On the express authority of *Kennedy* v. *Blackburne* (1), if these bills were not paid, we are of opinion that the demurrer must be overruled.' I regard this case as an authority for the proposition that, if the notes had been taken up by the creditor and paid at maturity, it would have been a good answer to the action independent of a certificate. It seems to me to follow that if the creditor had accepted the notes, the debtor could have defended an action brought while the notes were still current.

"This in fact is the decision in *Slater* v. *Jones* (2). Accordingly I give judgment for the plaintiff in the original action for £136 12*s.* 1*d.*, and he is also entitled to judgment on the counter-claim.

"Having decided the case on the grounds I have mentioned, it is not necessary for me to consider the other point argued, that the statement of affairs of the debtor, followed by his proposal, was not such an acknowledgment as would take the case out of the statute.

"I ought to add that I have carefully considered section 68 of the Bankruptcy Act, 1872, to which my attention has been called by Mr. Carton, but whatever may have been the views or intention of its framer, I am unable to construe it as a declaration by the Legislature that the only remedy of an arranging debtor, when sued by the creditor, is to apply to the Bankruptcy Court to restrain the plaintiff from proceeding."

The defendant now moved that the verdict and judgment should be set aside, and verdict and judgment entered for the defendant, or for a new trial.

Carton, Q.C., and *Wade*, for the defendant.

J. H. Campbell, Q.C., and *Morphy*, for the plaintiff.

Cur. adv. vult.

(1) 11 Ir. Jur. (N. S.) 388. (2) L. R. 8 Ex. 186.

GIBSON, J. :—

In this case, in which the Common Law Procedure Act of 1853 is a *prima facie* bar to the cause of action, which was assumed to have accrued in July, 1887, the action having been instituted on 28th October, 1893. The plaintiff relies upon three grounds for taking the case out of the operation of the statute. The exact time to be covered is left somewhat uncertain, as the precise date in July when the cause of action accrued was not discussed at the trial. On behalf of the plaintiff it was alleged that the period was to be reckoned from July 13th ; but it was conceded on both sides that more than six years, three months, and three days had elapsed from the accrual of the cause of action. We could not send the case to a new trial on this.

Taking the points in logical order, the first ground relied upon was the admission of debt in the arrangement from which it was urged that a promise to pay the original debt might be inferred. This contention is in my opinion unsustainable. The Irish authorities in reference to insolvency are distinguishable, as not only do they proceed upon statutes of limitation different from the Common Law Procedure Act, but they also are founded on the peculiar effect of insolvency which discharged, not the property, but only the person of the debtor, as was pointed out in *Re Clendinning* (1). Whether these insolvency cases are well decided or otherwise, the English authorities, such as *Everett* v. *Robertson* (2) and *Re Topping* (3), conclusively establish that in an arrangement the admission of debt, made by the debtor for a special and limited purpose, cannot be utilized as the basis of an implied promise to pay the original debt. *Morgan* v. *Rowlands* (4) is a striking illustration by the principle ; and *Davies* v. *Edwards* (5) where a payment in insolvency was held insufficient to save the statutory bar is to the same effect.

The second point put forward was founded on the dictum, attributed to Bramwell, B. in *Slater* v. *Jones* (6) that the arrangement must be taken to hinge upon an implied promise to pay the

(1) 9 Ir. Ch. R. p. 284.
(2) 1 E. & E. 16.
(3) 4 De G. J. & Sm. 551.
(4) L. R. 7 Q. B. 493.
(5) 7 Exch. p. 22.
(6) L. R. 8 Exch. 186.

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entire debt if the composition is not paid. Unquestionably, if the debtor fails to carry out his composition, the creditor is remitted or restored to his original rights. Whether this depends on the composition being treated as subject to an implied condition subsequent, defeating it in the event of non-payment, or on the effect of the legislation placing the creditor, if the composition is not paid, in the same position as if there had been no composition at all—see per Brett, J., in *Newell* v. *Van Praagh* (1)—it is unnecessary to inquire. There is no reason for implying a new voluntary promise to pay the original debt. The reasoning in *Topping's Case* (2) is quite opposed to any such implication. In that case, no doubt, the debt was already statute-barred. But a promise to pay such debt would, under ordinary circumstances, revive liability: *Philips* v. *Philips* (3). If it is law that an admission of liability in an arrangement does not amount to a promise to pay the original debt, I cannot see that a promise to pay can be implied in the event of the composition not being met. It is to be remarked that no such argument was suggested in *Topping's Case* (2); and the reasoning in that case would be nearly unmeaning if there was an implied new promise, as the statute would have been thereby got rid of. In *Slater* v. *Jones* (4) Bramwell, B., treated the case as one of voluntary composition at common law, and relied on *Good* v. *Cheeseman* (5) as an authority for his view. Unfortunately the English authorities, on which *Kennedy* v. *Blackburne* (6) was decided, were not brought to the attention of the Court. These authorities, and *Kennedy* v. *Blackburne* (6) (see O'Brien, J.'s judgment), clearly lay down that a statutory composition under the Acts of 1849 and 1857 is wholly different from a composition by mere contract between the creditors, and that a composition under the statute is not by itself (apart from the acceptance of bills or something similar), a legal defence to a creditor's action, though a common law contract of composition between creditors would be a defence. In a statutory composition there is no place or need for any implied contract. On default by the debtor, the creditor is said to be remitted or restored to his

(1) L. R. 9 C. P. p. 101.
(2) 4 De G. J. & Sm. 551.
(3) 3 Hare, at p. 299.
(4) L. R. 8 Exch. 186.
(5) 2 B. & Ad. 328.
(6) 11 Ir. Jur. (N. S.) 388.

original rights—an expression not consistent with the notion of the creditor acquiring by such default a right of action on a promise to be implied by the Court, which is not suggested by the statute, and which the debtor never was asked to give or thought of giving.

The third answer to the statutory bar, suggested on behalf of the plaintiff, was that the plaintiff having assented to the composition, and accepted bills, was thereby precluded from suing to recover the original debt, and that the running of the statute was suspended during the time that the creditor's remedy could not be enforced. Defendant's counsel argued that *Kennedy* v. *Blackburne* (1) and *Moran* v. *Reynolds* (2) were authorities against this position, and decided that a creditor's remedy, whether he assented or not, was unaffected by the composition till the final certificate was granted. The former case, based on English decisions upon the corresponding Bankruptcy Act of 1849, is clearly binding on this Court; but it only decides that a statutory composition is not a defence to an action by a creditor who had not assented or accepted composition bills. The latter case goes further, deciding that a non-assenting creditor is at liberty to enforce judgment by execution against the goods of the arranging debtor. This decision is opposed to the decision in *Jones* v. *Simpson* (3), and to the dictum of Hill, J., in *Williams* v. *Dray* (4), who says that it would be strange if a Court of Westminster Hall should lay down that the protection of the person was no protection of the goods. It is no doubt anomalous that, pending the carrying of the composition, the person and property of the debtor should be protected (under sect. 343) from process, and that when the composition was carried and became binding, the protection of property against process should disappear. The policy of the arrangement is equality between the creditors bound by it, and after composition a bargain between creditor and debtor for payment of the debt in full would be illegal: *Ex parte Barrow* (5). It would seem, according to *Moran's Case* (2), that a non-assenting creditor would be at liberty, without any contract at all, to sweep away the assets

(1) 11 Ir. Jur. (N. S.) 388.
(2) Ir. R. 3 C. L. 353.
(3) 3 H. & N. 836.
(4) 6 Jur. (N. S.) p. 533.
(5) 18 Ch. Div. 464.

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by an execution. There may be a distinction on this point between assenting and non-assenting creditors, though Lord Blackburn, in *Breslauer* v. *Brown* (1), says that there is not in his opinion any such distinction :—" When the resolution has passed, it is binding as much and no more, upon those who came in and assented, as upon those who came in and opposed." For the purpose of this case I assume *Moran* v. *Reynolds* (2) to be a binding authority so far as this Court is concerned.

In my opinion a creditor, whether he has assented to the composition or not, if he accepts the composition bills, is not at liberty, while such bills are current and not dishonoured, to sue for the original debt. He cannot approbate and reprobate : *Re R.* (3). Assuming this to be so, counsel for defendant further contend, 1, that this acceptance is the creditor's voluntary act, and cannot affect the operation of the Statute of Limitations, and 2, that, if the statute has once commenced to run, it cannot be suspended for a limited time. But, as to the first point, the acceptance of bills under statutory compulsion cannot be regarded as altogether a voluntary act : *Ex parte Jacobs* (4). The second point is of more difficulty. It has been held that an order to wind up a Company, an adjudication in bankruptcy, an administration decree in a creditor's suit, an absolute order for sale on the Landed Estates Court, arrest the running of the statute as against creditors or incumbrancers as the case may be. In all the above instances the operation of the statute is stopped once for all. Whether it could be suspended for a time only without affecting the cause of action, is a different question. The common law doctrine was that a cause of action once suspended by the voluntary act of the creditor was lost. The application of this rule was narrowed by distinctions pointed out by Willes, J., in his interesting judgment in *Newington* v. *Levy* (5). Thus a voluntary payment good at the time as extinguishing the debt might be rendered void by matter subsequent, such as a bankruptcy; and a release *prima facie* valid might similarly be avoided by some supervening event. So long as the payment or release stood,

(1) 3 App. Cas. p. 704.
(2) Ir. R. 3 C. L. 353.
(3) 23 L. R. Ir. 19.
(4) L. R. 10 Ch. App. 211.
(5) L. R. 5 C. P. p. 612.

the creditor could not sue; but, when they were removed out of the way, the right of action was restored. I am not aware of any case at law where the effect of this practical suspension of remedy on the running of the Statute of Limitations was considered and decided. Three different views might be taken. First, that when the creditor elects to treat the payment or release as void, it is to be looked on at law as if it had never existed, so that the statute would be regarded as continuously running during the interval, and the creditor would have to protect himself against this risk by insisting on a written acknowledgment of liability. Secondly, that the period of suspension is to be considered as entirely struck out of the time in calculating the statute. Thirdly, that the creditor gets a new starting point on the determination of the suspense period. Whichever of the two former views be taken, there would seem great difficulty in adopting the third and holding that in the case of a statutory composition there was any new implied promise to pay on default in meeting the composition, so that the statute should be considered as starting afresh on that event. Suspension of remedy does not import the creation of a new remedy. When the suspension is removed, the creditor ought to be in the same position as if there had been no suspension, but not in a better position. Take the case of a debtor extracting administration to a creditor, or a debtor, under the law before the Judicature Act, obtaining an injunction against a creditor. In these cases the suspension of the remedy does not involve any promise by the debtor, and the time which has preceded the suspension can hardly be disregarded in calculating the six years constituting the statutory bar, though the period covered by the suspension may be struck out of the computation.

In Equity it would seem to have been held that a covenant not to sue stops the statute, though such covenant in its ordinary form was not pleadable in bar at law, and the action of the statute was only arrested for a period covered by the covenant, Carson's Shelford, 9th Ed., p. 215. The principle seems to be that it would be inequitable to allow a debtor to rely on a delay attributable to his own act. I do not think that either of the cases cited by Mr. Carson in reference to covenants not to sue

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can be regarded as actual decisions that, on the determination of the period of suspense, the creditor is entitled to bring an action within six years by reason of any implied promise by the debtor. They certainly are no authorities that in case of a statutory composition any such promise can be implied. I understand that my brother Johnson considers that *Iven* v. *Elwes* (1) is in point; but in my opinion it is inapplicable for the following reasons. In the first place, it was immaterial whether the period antecedent to the suspension was reckoned or not, as the statute in either view was a bar. Secondly, the Vice-Chancellor was of opinion (p. 35) that the deed containing the covenant not to sue was an admission of liability so that the antecedent period could not be reckoned. I do not think that the plaintiff can do more than eliminate the period during which he was disabled from suing.

Assuming in the plaintiff's favour (though it is not necessary to decide the point) that the suspension of remedy makes it necessary to strike out the period covered by such suspension in the computation of the six years, this would not avail the plaintiff, as the first bill, which was given on the 9th March was dishonoured on the 30th April, when the plaintiff became at once free to sue. If the plaintiff, after the default, had waived it, and elected to treat the composition as still binding, a question of greater difficulty would have arisen on which I express no opinion: see *Ex parte Gilbey* (2); *Ex parte Burden* (3). Nor do I say whether, in the absence of contract between the parties binding both sides, a creditor is at liberty, by election on his own part only, to arrest the statute, if he is once in a position to sue: *Reeves* v. *Butcher* (4). In the present case there was no evidence or suggestion at the trial that there was any such waiver or election, even if that would help the plaintiff. The fact therefore that there were other bills current does not assist the plaintiff; nor did Mr. Campbell, though his attention was invited to the point, attempt to argue that it did. The moment that the first default took place, the plaintiff had a complete vested cause of action in respect of the original debt. The statute commences to run from the earliest period that the creditor can sue, and

(1) 3 Drew. 25.
(2) 8 Ch. Div. 248.
(3) 16 Ch. Div. 675.
(4) [1891] 2 Q. B. 509.

cannot be delayed by the exercise of any choice not to proceed: *Reeves* v. *Butcher* (1).

As any suspension of the plaintiff's remedy for the period covered by the first bill would be insufficient to take the case out of the statutory bar, the plaintiff next relied on the composition itself which he contended was carried by his active assistance, he having on December 16th sent in a proof of debt, with a proxy in the name of Mr. Devereux, the debtor's solicitor. There is obviously more difficulty in making out that the statute is suspended by the mere fact of composition with assent than in the case where bills are accepted. Assuming, however, that a composition carried with the assistance of the plaintiff's vote might have that effect, it is conceded that a suspension, from January 27th (when the composition became binding) to April 30th, would be insufficient to save the plaintiff's remedy; and his counsel accordingly argued that the period could be extended back to December 16th, when the proxy was sent in. If this could be done the Statute of Limitations would not be a defence. The point is one of some nicety. There is no evidence that the proxy was actually used for the purpose of carrying the composition at the second sitting, though very likely it was. Our only knowledge of the proxy was acquired from the bankruptcy file, which the Court sent for and read without objection, but which was not before, or considered in any way by, the Judge at the trial, nor was any evidence offered on the subject.

Had the proxy been used to carry the composition, there might have been an equity to restrain the creditor from executing any judgment so as to prejudice other creditors. But it appears to me that until the second sitting, everything was *in fieri*. The plaintiff was at liberty to withdraw the proxy and vote against the composition. How could any defence to an action have been pleaded founded on the proof and proxy of the 16th December? Mr. Campbell has cited cases to show that an agreement binding creditors at common law was pleadable though something remained to be done *in futuro*: *e.g. Tatlock* v. *Smith* (2). But in these cases there was an agreement which did bind. Here there was no

(1) [1891] 2 Q. B. 509. (2) 6 Bing. 339.

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binding composition until the second sitting. If therefore no plea to an action could have been pleaded between the 16th December and 27th January, it seems to follow that the statute was running during that period. It clearly would have run if the composition had fallen through at the second sitting. If the statute was actually running from December to the second sitting, it is not easy to see how, the moment the second sitting was carried, the statute is to be taken as having ceased to run retrospectively from December 16th. No authority was cited justifying such a fanciful way of dealing with the operation of the Statute of Limitations. If a composition falls through, whether from the second sitting not being carried, or from the composition not being paid, the creditor may sometimes, though not frequently, find himself exposed to peril from the statutory bar, though there is an obvious expedient for avoiding it. But this peril must affect all creditors where the second sitting is not passed, and it affects unquestionably non-assenting creditors who are perhaps equally likely to abstain from suing when they know that protection has been given and that an arrangement is pending. In this case the debtor was protected until April 30th. This protection did not prevent any action being brought and judgment recovered, but, as it made it impossible to obtain the fruits of a judgment by execution, it rendered litigation unlikely on the part of non-assenting and assenting creditors alike. In my opinion, the defendant is entitled to judgment.

Mr. Justice Harrison who is unable to be present to-day has read this judgment, and desires me to state that he concurs in it.

Johnson, J.:—

The plaintiff claimed £136 12*s.* 1*d.* (after all credits) for meat sold and delivered to the defendant, and by account stated. The period covered by the claim, as indorsed on the writ, is "September, 1883, to July, 1887"; but as averred in the reply is "between the months of September, 1883, and July, 1887." I find nothing more specific stated or proved as to the time when the debt accrued, though the only defence now relied on is the Statute of Limitations—the Common Law Procedure Act, 1853, s. 20. Mr.

Justice Holmes, who tried the case without a jury, found for the plaintiff. After the accrual of the debt, and after the Statute of Limitations had commenced to run, the defendant became an arranging debtor under the Irish Bankruptcy and Insolvency Act, 20 & 21 Vict. c. 60, ss. 343 to 348, and the Amending Acts. It appeared from the file of proceedings in the arrangement matter, which was produced in this Court, that on the 15th November, 1887, defendant's petition was presented for arrangement, the first sitting appointed for 6th December, and protection given to defendant's person and property until 6th December. This sitting and protection were enlarged from time to time to the 20th December. On the 16th December plaintiff filed his verified proof of debt for £136 12*s.* 1*d.*, and appointed the debtor's solicitor to act as plaintiff's proxy at the several sittings. On the 20th December the first sitting was adjourned and the protection extended to 6th January, 1888, when the first sitting was held, debts (including plaintiff's debt) admitted, and the protection further extended to the 27th January which was appointed for the second sitting. On the 27th January the Bankruptcy Court, pursuant to section 347 of the statute, approved of and confirmed the debtor's proposal of a composition of 5*s.* in the £, payable by four equal instalments at 3, 6, 9, and 12 months, secured by the debtor's promissory notes, the last note being further secured by T. Lyons; and the defendant's person only, not his property, was protected to the 30th April, being the day on which the first note would become payable. On the 13th March it was ordered that the notes be transmitted to the creditors; and accordingly four promissory notes each for £8 10*s.* 9*d.*, dated 9th March, 1888, and due respectively 27th April, July, and August, 1888, and 27th January, 1889, were delivered to and received by the plaintiff. Similar notes were at the same time delivered to and received by the other assenting creditors, differing only in amount according to their respective debts. The first note, with three days grace, matured and was payable on the 30th April. It was presented and dishonoured, and each of the subsequent notes was presented and dishonoured at maturity. There is no evidence that the plaintiff elected to waive the dishonour of any of these notes, and on 28th October, 1893, within

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six years from the 30th April, 1888, the present action was commenced by the plaintiff for his original debt. The defendant, in his account and statement of affairs, filed in the arrangement before the first sitting, returned plaintiff as a creditor for £136 12*s.* 1*d.* Until the debtor's proposal was approved and confirmed by the Bankruptcy Court at the second sitting on the 27th January, the plaintiff was at liberty at any time to have withdrawn his assent and proof, and to have stood on his original debt. The contention for the defendant is that the plaintiff's right to sue for his original debt in this action is barred by the Statute of Limitations, because, first, the plaintiff's Common Law right to bring an action for the original debt (subject to be restrained by the Court of Bankruptcy) was never interfered with by the arrangement proceedings, and more than six years had elapsed from the accrual of the debt before the commencement of this action; secondly, the admission of the plaintiff's debt by the defendant in his account and statement of affairs was not an acknowledgment to take the case out of the Statute of Limitations. The former of defendant's contentions is rested mainly on the decision of this Court in *Kennedy* v. *Blackburne* (1866) (1). In that case the plaintiff was a non-assenting creditor who opposed and was not bound by the arrangement; in the present case the plaintiff is one of several assenting creditors all of whom acquiesced in and adopted the arrangement, to and by whom the composition notes were delivered and accepted, and who were bound by the arrangement. This distinction takes the present case, in my opinion, out of the authority of *Kennedy* v. *Blackburne* (1).

The latter of defendant's contentions is I think well founded; it was rested in argument on the decisions in *Everett* v. *Robertson* (2), and *Ex parte Topping* (3); and these and other cases (following on this point the principle of the leading case of *Tanner* v. *Smart* (4)) decided that an acknowledgment to take a case out of the Statute of Limitations must be absolute and unqualified; and, whatever its terms, they must either amount to an express promise to pay the debt, or be such that an express promise to pay it is necessarily to be implied from them. The defendant's entry of

(1) 11 Ir. Jur. (N. S.) 388.
(2) 1 El. & El. 16.
(3) 4 De G. J. & Sm. 551.
(4) 6 B. & C. 603.

the plaintiff's debt in his account and statement of affairs was nothing more than an admission by him that he could not pay the debt except in part and in a qualified manner; therefore, it did not satisfy the requirements of the authorities, and was not an acknowledgment to take the case out of the statute. The Irish decisions on the 3 & 4 Will. 4, c. 25, s. 40, which were referred to, do not, in my opinion, affect the present case, which depends on the Common Law Procedure Act of 1853, s. 20.

The question then for decision is what is the position and what are the rights of the plaintiff, one of the several assenting creditors who received the composition notes which were not paid at maturity? *Slater* v. *Jones* (1873) (1) decided that until an arranging debtor made default in payment of a composition instalment under a resolution pursuant to the English Bankruptcy Act of 1869, s. 126, an action for the original debt could not be maintained by the creditor; and *Edwards* v. *Coombe* (1872) (2); *Re Hatton* (1872) (3); and *Edwards* v. *Hancher* (1875) (4) decided that after default the action could be maintained. The English Bankruptcy Act of 1869, s. 126, is not in the same terms as the arrangement sections (ss. 343 to 348) of the Irish Act of 1857; but in *Erskine* v. *Moreland* (1876) (5) the English cases are recognised as authorities for the principle that in arrangements under the Bankruptcy Act of 1857, giving composition notes without paying them is not a satisfaction of the original debt, which therefore still subsists, and on the debtor's default in paying the notes, may be recovered by the creditor. *Smith* v. *Simmonds* (1888) (6), which was an action for the original debt, is not in conflict with these decisions, because in that case the defence, while relying on an arrangement under the Act of 1857, carefully avoided averring that composition notes had been issued or paid to the plaintiff, who in fact had withdrawn his proof of debt and was a non-assenting creditor, and to whom no note had been delivered or paid; and therefore it was held that the decision in *Kennedy* v. *Blackburne* (7) applied to his case, and that he was en-

(1) L. R. 8 Exch. 186.
(2) L. R. 7 C. P. 519.
(3) L. R. 7 Ch. 723.
(4) 1 C. P. D. 111.
(5) Ir. R. 10 C. L. 243.
(6) 8 L. R. Ir. 357.
(7) 11 Ir. Jur. (N. S.) 388

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titled to recover his original debt because the defendant had not obtained his final discharge under the act of 1872 (35 & 36 Vict. c. 58, s. 64) which is substituted for section 352 of the Act of 1857. The reason for this in my opinion is that the composition notes are only conditional payments of the original debt, the condition being that the debtor according to his agreement pays the notes as and when they mature. As each note is paid the original debt is extinguished *pro tanto*, and when they are all paid the condition is fulfilled. The original debt is discharged, and the debtor is entitled to his certificate under the Act of 1872, s. 64, because he has paid the accepted composition at the times and in the manner agreed on. But if any one of the notes is not paid at maturity the creditor is thereupon—*Hemp* v. *Garland* (1); *Reeves* v. *Butcher* (1891) (2)—entitled to sue for his original debt after giving credit for any sum paid to him in the composition: *Ex parte Gilbey* (3). On default of payment of the first note on the 30th April, 1888, the plaintiff was entitled to sue for his original debt which subsisted throughout. In the words of Willes and Brett, JJ., in *Edwards* v. *Coombe* (4), and of Archibald, J., in *Edwards* v. *Hancher* (5), "the original debt remains and may be resorted to." We have no precise information when the Statute of Limitations, which the defendant relies on to bar this action, commenced to run against the plaintiff's debt; but it certainly was running when the defendant presented his petition for arrangement; and it expired before the present action was commenced. As a general rule, once the Statute has commenced to run its operation is not stopped by any subsequently supervening disability except it be by act of law such as administration to a creditor granted to his debtor, or a judgment in an administration action, or a winding-up order under the Companies' Act, 1862, or an adjudication in bankruptcy, which are in the nature of trusts for creditors, or executions, or an action for the debt; and then the statute in such cases is absolutely stopped. Authorities on this point are collected in Shelford's Real Property Statutes (9th Ed.) pp. 141, 196, 215; Darby and Bosanquet's

(1) 4 Q. B. 519.
(2) [1891] 2 Q. B. 509.
(3) 8 Ch. Div. 248.
(4) L. R. 7 C. P. 519, 524.
(5) 1 C. P. D. 119.

Stat. of Limitations (2nd Ed.), p. 25, and Pt. viii., Ch. 2. A debtor may also for sufficient consideration contract with his creditor not to set up the statute: see *Lade* v. *Trill* (1).

In the present case the plaintiff and all the other assenting creditors mutually adopted the composition, and by accepting the composition notes were respectively bound to forbear to sue for their original debts while the notes were current, or at all, if the notes were paid. The defendant had the advantage of this forbearance, but, in the plaintiff's case, the statutory six years elapsed during the forbearance. In this state of things the contention for the plaintiff, as I understand it, is that it is not open to the defendant to allege against the plaintiff or any other similarly circumstanced assenting creditor that his right to recover his original debt was barred by the statute during the creditor's forbearance, while his hands were tied and he was precluded from suing; and that, during this forbearance, either, 1, the running of the Statute of Limitations is suspended, or, 2, as put by Bramwell, B., in *Slater* v. *Jones* (2), the composition is (*a*) equivalent to an accord and satisfaction defeasible by matter subsequent, or, (*b*), contains an implied term that if the debtor makes default in paying the composition as agreed he will pay the original debt in full, or, 3, that, as the defendant, in the case of a covenant not to sue for a limited period, could not in equity have relied on the original debt becoming barred by the statute during that period, so now, having regard to the provisions of the Judicature Act, he cannot in this Court set up the statute as a bar to the present action.

Dealing with these propositions in this order—As to the first viz. that the running of the statute was suspended during the creditor's forbearance, *Newell* v. *Van Praagh* (3) was cited. In that case the plaintiff, a judgment creditor, obtained a Judge's order under the Debtors' Act against the defendant (his debtor) for payment of the judgment debt by instalments. The defendant paid three of the instalments and then became an arranging debtor under the English Bankruptcy Act of 1869, and compounded with his creditors for a sum to be paid in two equal parts; the plaintiff was bound by the composition; the defendant made

(1) 6 Jur. 272. (2) L. R. 8 Exch. at p. 195. (3) L. R. 9 C. P. 96.

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default in payment of the first part of the composition, and on the application of the plaintiff, the Court of Common Pleas ordered the committal of the defendant for non-payment of the fourth instalment of the judgment debt. Counsel for the defendant in the present case rely on the language used by the learned Judges in giving judgment in that case. Lord Coleridge, C.J., says (at p. 99), "The point decided in both these cases"—*Edwards* v. *Coombe* (1) and *Re Hatton* (2)—"appears to be that, so far as the right of action is concerned, default in payment of the composition remits the creditor to his original position"; and later on he says:—"It" (the composition) "was not so carried out and the effect was that the judgment debt revived. That seems to me to show that the creditor was remitted to the same position as that in which but for the composition he would have been." And Brett, J., says (at p. 101), "It seems to me that the decision in *Edwards* v. *Coombe* (1) turned on the construction of the Bankruptcy Act and not on the common law doctrine of suspension of a remedy; that the meaning of the statute was that the creditor should not be entitled to go on with an action until the composition was due, and that, if paid when due, it should extinguish the debt; but that, if it were not paid, it should be just as if there had been no composition, and the creditor should be entitled to the usual remedies, and be generally in the same position as if the resolution for the composition had never passed"; and, later on (at p. 102), "It follows that in one sense of the word the judgment debt and all the remedies of the plaintiff were revived, *i.e.*, that he became able again to enforce them." Both these judgments were rested on the construction of the Bankruptcy Act of 1869. Similar language is used in other cases, and it is argued that the only way in which effect can be given to such language (when the Statute of Limitations is concerned), in order to replace the creditor in the position he was in before the composition, is to hold that the operation of the statute is suspended as long as the creditor is precluded from suing for his original debt. But the act of the law when it intervenes stops and does not suspend the running of the statute, nor is it easy to see how suspending the

(1) L. R. 7 C. P. 519. (2) L. R. 7 Ch. App. 723.

running of the statute would (even if feasible) have the effect of necessarily remitting the creditor to his original position in fact, because in the interval of his enforced forbearance it may be very materially altered to his prejudice. Non-assenting creditors may (subject to the jurisdiction of the Court of Bankruptcy to restrain them), utilise this interval to sue for their debts and even levy execution, thus diminishing the available means of the debtor to meet his composition as was illustrated in the present case. On the production in this Court of the file of proceedings in the arrangement, it appeared that Messrs. Foley, non-assenting creditors, not bound by the arrangement, brought an action against this defendant, recovered judgment, and issued execution, and a motion to the Court of Bankruptcy to restrain them from levying execution was unsuccessful. *Newell* v. *Van Praagh* (1) decided that on the debtor's default the creditor retained and could pursue all remedies vested in him at the time he became bound by the composition, but no question of the Statute of Limitations was then under consideration; and the language of the learned Judges is to be read in reference to the matter they were then deciding.

My brother Gibson has referred me to *Baylee* v. *Browne* (2). The material dates and facts of that case (so far as the Statute of Limitations is in point) are these. In 1808, a decree was made for sale of lands and for payment of creditors out of the proceeds, in 1814, the defendant or the person under whom he claimed succeeded in staying proceedings under the decree of 1808, and it was not until 1836, after twenty-two years of protracted and unfounded litigation by the defendant, that the creditors were able to proceed to enforce the decree of 1808. The defendant set up the statute, but the Master of the Rolls said (at p. 195), "It appears therefore to me that the defendant cannot count the period from 1814 to 1836, during which the creditors were, at his instance, or at the instance of the party under whom he derives, prevented from proceeding; and, if so, there is an end of the Statute of Limitations." Thus the defendant was unable to set up the statute at all, because, on the principle established by *Pulteney* v. *Warren* (3) and the other cases collected in the note 11 Bligh N. S. 190,

(1) L. R. 9 C. P. 96. (2) 10 Ir. Eq. R. 180. (3) 6 Ves. 73.

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"where a party applies to a Court of Equity and carried on an unfounded litigation, protracted under circumstances and for a length of time which deprives his adversary of his legal rights, the Court of Equity considers that it should itself supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party, so prosecuting an unfounded claim, has deprived his adversary": *East India Company* v. *Campion* (1). I therefore hardly think that case is an authority on the present case for suspending the statute, and in my opinion the contention of the plaintiff on this first proposition is not sustained. It does not however appear to be very material, because I understand it to be admitted on both sides that even if the running of the statute could be suspended, the period of the suspension (three months and three days from the 2nd January, to the dishonour of the first note), would not be sufficient to prevent the statute being a bar to the present action.

As to the second proposition, viz. the view expressed by Bramwell, B., in *Slater* v. *Jones* (2). This is not disapproved of in *Newell* v. *Van Praagh* (3), which followed *Edwards* v. *Coombe* (4), and *Re Hatton* (5), and in which the Judges are careful to point out that their decision is not inconsistent with *Slater* v. *Jones* (2), and all these decisions are cited with approval in *Erskine* v. *Moreland* (6). The first ground mentioned by Bramwell, B., is that the composition is equivalent to an accord and satisfaction defeasible by matter subsequent, *i. e.* the debtor's default, whereby a cause of action accrued. The law however appears to be settled that on the debtor's default the creditor's cause of action is his original debt, and also that the composition note in an arrangement under the Bankruptcy Act is a conditional payment and not accord and satisfaction defeasible.

The second and alternative ground mentioned by Bramwell, B., is that "the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default; the other by the debtor that in case he fails to pay the composition at the time agreed he will pay the whole debt." And the learned Baron

(1) 11 Bligh (N. S.) p. 187.
(2) L. R. 8 Exch. 186, 194.
(3) L. R. 9 C. P. 96.
(4) L. R. 7 C. P. 519.
(5) L. R. 7 Ch. App. 723.
(6) Ir. R. 10 C. L. 243, 247.

says:—"to insert those terms is strictly in accordance with *Good* v. *Cheesman* (1)," to which I may add *Irving* v. *Veitch* (2). In dealing with terms implied by law in an agreement, Bowen, L. J., says:—"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side": *The Moorcock* (3). In the present case the law was, and therefore the presumed intention of the parties was, that, if the debtor made default in paying the composition as agreed, the creditor should recover his original debt and that the debtor should not avail himself of the creditor's enforced forbearance to take advantage of his own default to defeat the creditor's debt by setting up the Statute of Limitations against the creditor during that forbearance. Therefore the term which Bramwell, B., says is implied by law appears to be necessarily drawn from what obviously must be taken to have been the intention of the parties, of the creditors on the one side, and the debtor on the other.

It was argued that no such implication can be made because even the entry by the debtor of the debt in his account and statement of affairs is not a promise to pay the debt and therefore not an acknowledgment within the statute, but this implication is made not from that entry or from anything like it, but from the arrangement and composition which the debtor and his creditors have mutually entered into, in which it is involved that if the debtor fails to pay the agreed composition the creditor may recover his original debt. I therefore think that the present case falls within this second alternative principle mentioned by Bramwell, B.

The third proposition is founded on the jurisdiction and practice of Courts of Equity. Arrangements in bankruptcy had their origin in arrangements between debtors and creditors formerly carried out usually by means of trust deeds and covenants not to sue for a limited period. It was not, I think, until 1844 in England and 1857 in Ireland that the modern statutable provisions were enacted for facilitating such arrangements under the control

(1) 2 B. & Ad. 328. (2) 3 M. & W. 90. (3) 14 P. D. 64, at p. 68.

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of the Bankruptcy Courts, and these questions therefore have more frequently arisen in Equity than at law. Formerly at law, although a perpetual covenant not to sue might have been pleaded in bar as a release, a covenant not to sue for a limited period could not be pleaded in bar (unless the deed expressly so provided) because a right of personal action once suspended was thereby extinguished, and the debtor's only remedy was by cross action for breach of covenant. But in Equity the covenant was enforced, even when the Statute of Limitations was in point, not I think by suspending the operation of the statute for any specified time, but by preventing the debtor from setting up the bar of the statute, thus giving the creditor the expiration of the limited period as a new terminus from which the statute should run; as for instance the two cases cited at the bar of *O'Brien* v. *Osborne* (1) and *Iven* v. *Elwes* (2), in which existing simple contract debts, against which the statute was running, were made the subject of a creditor's covenant not to sue until a specified event. In one of those cases, *Iven* v. *Elwes* (2) the simple contract debt was due in 1830, and the statute therefore had commenced to run before 1831 when the deed was executed. The specified event, until the occurrence of which the creditor covenanted not to sue, was the death of one of two persons, and the question is thus stated by Kindersley, V.-C. (at p. 33):—"The second question is then, supposing it" (the simple contract debt) "not to have been converted into a specialty debt" (and the Vice-Chancellor held, on the construction of the deed, that it remained a simple contract debt), "is the period of six years which would bar it to be computed from the death of Peter the son in 1839, or from the death of Peter the father in 1851." And he held on the construction of the deed that the specific event was the son's death in 1839 from which the statutory six years were to run. In the other case, *O'Brien* v. *Osborne* (1), Turner, V. C., says:—"It is according to the terms of the deed that no proceedings for the recovery of the debt, otherwise than out of the appropriated property, shall be taken during the life of Sir John Osborne, and the debtor or his representatives cannot under such circumstances afterwards set up this abstinence of suit in

(1) 10 Hare, 92. (2) 3 Drew. 25.

pursuance of the contract as a bar to the claim of the creditor." The result of these two cases is thus stated in Darby and Bosanquet (2nd Ed.), p. 40 :—"It was held in equity that where there was a provision made by the debtor for the payment of his debts out of certain specific life interests, and the creditors covenanted not to sue till the life interests had determined, the creditors could sue at any time within six years after their determination"; and at p. 270,—"so now, if a similar claim were brought, a defence of the statute would be well answered by a reply that there had been an agreement not to sue for a certain time, and that the action was commenced within the statutory period of limitation after the deferred time had expired." The text book presumably reflects the opinion of the profession. A covenant not to sue in form differs from, but in substance is, I think, similar to the acceptance, by an assenting creditor, of composition notes in an arrangement composition. Under the Judicature Act and Rules, regard is to be had to substance not to form, and this jurisdiction is now exercisable by this Court.

For these reasons I think the present case is not governed by the decision in *Kennedy* v. *Blackburne* (1), and that the Statute of Limitations commenced to run against the plaintiff on the defendant's default to pay his first composition note and therefore is not a bar to the plaintiff's claim in this action, which was commenced within six years after the 30th April, 1888. Each party knew the case to be made and to be met, and if necessary the pleadings should be moulded to meet the case. No point has, however, been raised on this. I therefore think that the judgment for the plaintiff ought to stand.

O'BRIEN, J. :—

This is an action for an admitted debt, for which composition notes were given under a statutory arrangement in Court; the defence is the Statute of Limitations; and the case is this, that the time was not gone when the notes were taken, but by the defendant's default to pay them the six years have elapsed, so that the plaintiff's remedy for his demand is lost. The principle

(1) 11 Ir. Jur. (N. S.) 388.

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of composition is founded upon actual payment; and it is no answer that the plaintiff could have sued on the composition notes and obtained judgment; for, if he had to go to law there is no reason why he should not go to law for the whole debt as well as a fraction of it. That a defendant could in this way take away the right of his creditor and give him a substitute, which he himself had the power of making and did make delusive, would seem to be what we are accustomed to regard as chicane. In other words, the defendant having used the law to keep his creditor out for a certain time, at the end of that time courteously informs him he may come in, but there is nothing for him. From a situation so interesting, the mind naturally seeks some escape in the direction of common reason and justice. And there are four different ways out of the dilemma suggested in argument.

The first is, that the whole period of the arrangement proceedings from the petition, and if not from that point, from the declared assent of the creditor, is to be taken out of the six years, and that would leave a supposed balance of time in hand. So, if the right that the creditor has, upon default, to sue for his original demand, were not restricted to the first of the notes, but prolonged to the whole of them, that would likewise answer. So also, if the notes, combined with the fact of the debt on foot of which they were given as capable of being shown in evidence, amounted to an acknowledgment in writing within the statute, that would be enough. Lastly, if the transaction of the composition involved a new implied promise to pay the whole demand, in case he made default—which was the view suggested by Lord Bramwell in *Slater* v. *Jones* (1), and appears to have been acquiesced in by Mr. Justice Holmes in the present case—in that event, also, the plaintiff is entitled to succeed. It appears to me that there is a great deal to be said in support of at least some of these propositions, and that the argument to that effect is not excluded by any of the decisions which have been referred to. They are not inconsistent with each other; but it is necessary to determine which is the true solution, because they involve different consequences; for, if the effect be that a certain time merely is cut out

(1) L. R. 8 Exch. 186.

of the six years, the statute takes up the rest of the period and runs on to the end, although I do not know any instance in law of the resumption of its course by the statute after an interruption; whereas certainly, if the ground of an acknowledgment, or a new promise, be admitted, an entire new period of six years begins to run.

As a preliminary to the examination of these propositions, I think the two cases of *Kennedy* v. *Blackburne* (1) and *Slater* v. *Jones* (2), on which so much of the stress of the argument was laid on both sides, may be put aside altogether. For, in *Kennedy* v. *Blackburne* (1), the Judges, in holding that the fact of the certificate being ultimately granted was a necessary condition of the suspension of the right to sue, applied that rule to an instance in which the creditor gave no assent to the arrangement; and it is only upon expressions used by them larger than the case itself required, that it is contended to embrace a case like the present, where notes were given that could be negotiated next day, and where the debtor, by the inevitable operation of the facts, could not be put back into the same position.

The distinction is drawn in the judgment itself, for Mr. Justice O'Brien says that the creditor not only did not assent to the arrangement, but opposed it, and was not bound by the arrangement except so far as it was a necessary conclusion from the Act of Parliament. Mr. Justice FitzGerald also assents to the same distinction, where he says there is another point whether, if the plaintiff received the statutable composition, the defence might not be good, not by the statute, but by virtue of having received the composition. *Slater* v. *Jones* (2), decided on a statute not requiring the condition of a certificate, and assigning expressly the effect of the composition as a satisfaction of the debt, leaving out altogether the case of default, was not contrary to that decision. Neither of these cases, therefore, decides the present one.

Without the statute, the acceptance of notes for a composition by agreement between creditors and their debtor, would certainly have suspended the right to sue till default, though no case appears to have decided whether, in the event of default, the period of

(1) 11 Ir. Jur. (N. S.) 388. (2) L. R. 8 Ex. 186.

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suspension would be taken out of the statute. On principle, the distinction is obvious, for that would be the creditor's own act, the consequence of which—as to the statute not being stopped—he must be taken to have foreseen. But in all cases of direct adverse interference of the law with the remedy of the creditor, such as petition for sale, a decree in equity, the appointment of a receiver, etc., the statute is necessarily stopped, for the law cannot at the same time tell the creditor he was bound to go on, and keep him back. With respect, however, to the first point, I fail to see any principle on which—when the creditor is restrained without his will, by an arrangement under the statute, from proceeding to enforce his demands—the point, at which the statute begins to be arrested, can be fixed at any time but the institution of the proceedings, where the resolution is ultimately sanctioned. For, though the creditor may recede from the arrangement, and the whole thing fall to the ground, so that there would be no interruption of the statute for any period, that is not a sufficient argument, when in fact the arrangement is carried, to show that it does not relate back so as to cover the whole period from the first institution of the proceedings. That, I apprehend, would be the result of the analogies of the cases of restraints—but the restraint would attach at the first step, and the statute stop at that point when the proceeding was ultimately effectual—that, for example, the time would not expire in the interval between a petition for sale in the Landed Estates Court and the absolute order—between an action in Chancery and the decree—between a proceeding for a receiver and his appointment. In other words, according to my view, the statute stops at the point that first founds the jurisdiction which is eventually exercised.

With respect to the second question disputed—whether the exception out of the six years covers only the first default—the non-payment of the first of the notes, when it is agreed that the plaintiff could have sued—or extended to the whole twelve months, during which he abstained from suing—Mr. Justice Gibson has called my attention to an important case: *Reeves* v. *Butcher* (1) in the Court of Appeal in England, reported in the 2nd

(1) [1891] 2 Q. B. 509.

volume of the last new series of Reports, which is certainly very close to the question, if at all distinguishable. That was the case of a loan for five years, to be paid off by quarterly instalments, with a right to the creditor to call in the whole debt on any default. He did not sue upon the first default, but waited till the end of the five years, and it was held that the statute ran from the stipulated time after the first instalment became due, and that he was barred. That case must be held to extinguish in principle the difference between the option to sue, and the exercise of the option, as determining the point of time when the cause of action accrues, for the purpose of the Statute of Limitations. But, considering the somewhat anomalous position of allowing the debtor to deprive the creditor of his right by reason of what is a benefit to himself, and that the decision was based upon the case of *Hemp* v. *Garland* (1) in the Queen's Bench, which it was strongly argued it went beyond, it might be open to suggest, as a reason against *Reeves* v. *Butcher* (2) being itself extended, that a distinction exists between that case and the present, that it was by the express terms of the contract itself that the right of action arose on any default, whereas in this case it results from the operation of law, by which the party is remitted to his original right. However, if the legal result be, as may be contended, that not only is the statute stopped, but that a new period of six years begins from the interruption—a point that I do not know to have been expressly decided, whether the cause of action accrued after the first default, or at the end of the whole period of default, in this case is not material.

With reference to the question that was so much argued, as to whether there was evidence of an acknowledgment that would take the case out of the statute, although the fact of a legal proceeding, and composition notes being given, are the most authentic possible admission of a debt—we have to consider the question, whether the notes, even if, without the violation of any rule of evidence, it could be shown that they were given in composition for a larger demand, satisfy the definition of an acknowledgment which implies a promise to

(1) 4 Q. B. 519. (2) [1891] 2 Q. B. 509.

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pay according to the construction repeatedly put upon the statute. *Everett* v. *Robertson* (1), which was the case of the signature to a petition to the Court of Bankruptcy, signed by the insolvent, in my opinion, is decisive against that conclusion. And it appears impossible to give that effect to it. For if it were an unconditional admission of the debt, it follows that the whole demand must be capable of being sued for immediately, which would be directly contrary to the agreement. The composition note is a promise to pay a specified sum at a certain future period. That exhausts its function, and to attribute another effect to it, that of a promise to pay a larger sum, which, if existing at all must be capable of being sued upon at once, would be inconsistent with the function.

On the last ground, however, though my view was at first different, that there was an implied promise to pay resulting from default in meeting the composition, I am clearly satisfied, in favour of right and justice, and both upon reason and authority, that the plaintiff is entitled to recover. That was the view taken by Mr. Baron Bramwell in *Slater* v. *Jones* (2), and which the Judge adopted in the present case. What is it that constitutes an implied promise? There is an admitted debt. There is an agreement to take part of the demand upon a condition—the condition of actual payment. The condition is not fulfilled. What is the consequence? The law says the creditor is remitted to his original cause of action. The debtor must be taken to know that. He enters into an engagement, therefore, to do that which the law annexes as a consequence to his failure to perform the condition. It is for that engagement the creditor has exchanged this immediate right of action. Condition in its nature imports the performance of the alternative, if the condition be not satisfied. But if the debtor assumes a liability according to the law—that is a promise made at the time, and is therefore a new promise. It cannot be a promise to pay from a past period, and a new promise at the same time. The idea that the cause of action must be taken up with the burthen of years that has adhered to it, arises from a misconstruction of the word "remitted" in the expression of the rule of law. He is

(1) 28 L. J., Q. B. 23; 1 Ell. & Ell. 16. (2) L. R. 8 Ex. 186.

"remitted," but to what? to the original cause of action—not to a waning right, but to a right endowed with new youth from the new implied promise. The law could not send him back to stand where he stood years before, after he has altered his position on the terms of a new existing present right. What he gives up is a present right, and what comes back to him therefore must be a present right. That is the way it stands in principle. But further, the matter is in my opinion concluded by authority. For *Irving* v. *Veitch* (1) appears to me to be an absolute decision on the question. That was the case of an agreement made in the year 1827 to pay a large sum by yearly instalments. The debtor failed to pay the instalment that was due in September, 1830, and it was held that the creditor had six years to bring his action from 1830, and not from 1827, the date of the contract. Lord Abinger says "What is the meaning of it but that the plaintiffs shall be at liberty to sue on the notes, if the defendant does not comply with the contract?" And Baron Parke says: "On looking to the terms of the agreement, it appears to me that it amounts to an agreement on the part of the defendant to pay by instalments, and, provided the instalments are not duly paid, to pay the original debt; it is therefore a promise, in certain events, to pay the original debt itself, and these events have occurred by which the original debt has become payable, because the instalments have not been duly paid." And, though a judge who was inclined to the greatest strictness of pleading, even though he said the declaration could have been framed on the new agreement—he held it was sufficient to declare on the original cause of action. The point of the case, as regards the present question, is that the cause of action was the original one, but that, as regards the Statute of Limitations, it was advanced in its integrity to the time of the default. I am therefore of opinion that there was a new and implied promise, and the plaintiff was entitled to recover the whole demand, and was not barred by the statute.

GIBSON, J., having, as junior Judge, withdrawn his judgment, judgment was directed to be entered for the plaintiff with costs.

A. E. R. J.

(1) 3 M. & W. 90.

Appeal.
1895.
M'Donnell
v.
Broderick.

The defendant appealed to the Court of Appeal (Walker, C., Fitz Gibbon and Barry, L. JJ.)

Carton, Q.C and *Wade* for the appellant.

April 25.
May 18.

Campbell, Q.C., and *Morphy*, for the respondent.

The arguments appear sufficiently from the judgments.

Cur. adv. vult.

May 18.

Walker, C.:—

In this case Broderick the defendant owed the plaintiff in 1887 the sum of £136 12*s.* 1*d.* for goods supplied. It was some time due, and the Statute of Limitations had begun to run against the demand in July, 1887. On November 15, 1887, Broderick presented his petition to the Court of Bankruptcy for an arrangement with his creditors, praying in the usual form that his person and property might be protected from process until further order, and that such proposal as he might be able to make to his creditors for the future payment or compromise of his debts and engagements and which should be agreed to by them might be executed under the direction of that Court.

The proposal of Broderick was a composition of five shillings in the pound on all his unsecured debts and on so much of his secured debts as were not fully secured, payable in four equal instalments at three, six, nine, and twelve months respectively from the confirmation of the proposal by the Court, all the said instalments to be secured by the promissory notes of the petitioner, and the last to be secured by a surety. The first private sitting was held on January 6, 1888, when three-fifths in number and value of the creditors who had then proved debts to the amount of £10 assented to the proposal. The second private sitting was held on January 27, 1888, when the proposal was confirmed.

The plaintiff was an assenting creditor and proved in the arrangement for the sum of £136 12*s.* 1*d.* Promissory notes were duly issued to the plaintiff, and the first of them became due on April 30, 1888, but was not paid.

The plaintiff on October 28, 1893, issued a writ for the sum of £136 12*s.* 1*d.*, his entire demand. The defendant pleaded

amongst other defences, the Statute of Limitations. The case was tried before Mr. Justice Holmes without a jury, and he after argument and consideration directed a verdict to be entered for the plaintiff. The defendant appealed to the Divisional Court with the result that Mr. Justice Harrison and Mr. Justice Gibson were of opinion that the Statute of Limitations furnished a good defence to the action. Mr. Justice O'Brien and Mr. Justice Johnson concurred with the view taken at the trial by Mr. Justice Holmes. The defendant has appealed.

It is obvious that more than six years elapsed from the time when the Statute began to run to October 28, 1893; but the plaintiff contends that the effect of the arrangement proceedings is to give him a cause of action unaffected by the Statute. There does not appear to be any difference of judicial opinion as to one question raised during the argument, viz. whether the statement of the plaintiff's debt in the arranging debtor's account amounted to a promise to pay it sufficient to prevent the operation of the Statute applicable to this simple contract debt. *Everett* v. *Robinson* (1) and other cases appear to have concluded that question in the defendant's favour.

The general proposition is well settled that if the agreed composition is not paid the creditor is remitted to his original rights, and may sue for his original debt in full, but under what conditions and with what alterations of remedy in respect of the Statute of Limitations does not appear to be concluded. The argument for the defendant in this case is that the Statute was running all the time notwithstanding the arrangement, that the arrangement involves no admission or agreement in respect of the debts proved or provable under it; and if the debtor by his own default (wilful or otherwise) fails to carry out the arrangement which he has agreed to, the creditor is remitted to a status in which he will or may find the remedy for the original debt barred, and the very omission to carry out the arrangement will have had the effect of defeating the creditor because the time spent in the abortive arrangement will to the necessary extent have made up the statutory bar.

(1) 1 Ell. & Ell. 16.

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Mr. Carton answers that the arrangement does not prevent the bringing of an action for the debt and pursuing it to judgment, and that the only remedy against this course is to apply to restrain the action under section 68 of the Act of 1872. It would follow that every creditor when the Statute had made progress in running should, to keep himself safe, go on with such an action—a strange result!

Again, pursuing the proposition that the creditors are remitted to their original remedies are they all, when the debtor has made the arangement proceedings abortive and illusory, to have each his old start as regards the Statute of Limitations? or is it rather the law that when the debtor fails to pay the composition he stipulated to pay, and thus sets the creditor free, he—at least as to a creditor who has proved in the arrangement and has assented to the composition—cannot be heard as against that creditor to in any way impeach his title upon matters founded on his own default? If here upon April 30, 1888, the Statute would have run against the old debt is it not the condition of the arrangement as against the debtor that if he does not pay the original debt remains unbarred? No case has arisen in which it was necessary to decide such a question, but the principles of decided cases in which the creditor was held to be remitted to his original rights must be carefully considered.

In *Edwards* v. *Coombe* (1) the main question was whether the resolution under the Act of 1869 was a defence, though the composition had not been carried out. It was held that this question must be answered in the negative, and that the plaintiff was entitled to sue for his debt. In giving judgment, Willes, J., said:—"In this case I think that the non-payment of the composition was the failure of a condition going to the whole root of the arrangement and that the original debt remains and may be resorted to." No question on the Statute of Limitations arose there, but the vitality of the original debt seems to be involved as the condition which lay at the root of the arrangement. The principle of *Edwards* v. *Coombe* (1) was affirmed in *Re Hatton* (2), where the question arose upon a motion for an injunction, and in *Newell* v. *Van Praagh* (3).

(1) L. R. 7 C. P. 519. (2) L. R. 7 Ch. 723. (3) L. R. 9 C. P. 96.

The case of *Slater* v. *Jones* (1) turned upon the point whether the resolution could be pleaded in bar to an action for the original debt, before default by the debtor, and the difficulties there suggested arose on the former decisions, to which I have just referred, viz., whether the right of action once suspended could come into existence again. The basis of reconcilement stated by Bramwell, B., is what makes his opinion so valuable here. He says (at p. 194):—"I think, therefore, we can assent to these two decisions"—*i.e. Re Hatton* (2), and *Edwards* v. *Coombe* (3)—"and yet hold the pleas good thus:—Either this resolution is equivalent to an accord and satisfaction defeasible by matter subsequent, and when the matter happens whereby it is defeated (*i.e.* the debtor's default) a cause of action accrues, or else the composition resolution contains two implied terms, one by the creditors that all will forbear to sue until default, the other by the debtor that in case he fails to pay the composition at the time agreed he will pay the whole debt." The principle underlying Baron Bramwell's opinion seems to be found also in *Irving* v. *Veitch* (4), where Baron Parke says (at p. 110):—"The question then is, whether the declaration as it stands at present is not sufficient, and whether the case cannot be taken out of the statute, upon this declaration, by means of the new engagement; and after having entertained some doubt, I think it is taken out of the statute, and the count upon the promissory note may in this case be sufficient. On looking to the terms of the agreement, it appears to me, that it amounts to an agreement on the part of the defendant to pay by instalments, and provided the instalments are not duly paid to pay the original debt: it is therefore a promise, in certain events, to pay the original debt itself."

Mr. Carton did not question these decisions, but he said that the arrangement clauses of the Act of 1857 are so framed that the creditor is not prevented from suing, though under section 68 of the Act of 1872 he is now liable to be restrained, and for that proposition he relies upon *Kennedy* v. *Blackburne* (5). It is not

(1) L. R. 8 Ex. 186.
(2) L. R. 7 Ch. 723.
(3) L. R. 7 C. P. 519.
(4) 3 M. & W. 90.
(5) 11 Ir. Jur. (N. S.) 388.

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necessary for me to express any opinion as to the soundness of that decision which was made by two very eminent Judges; but in that case the creditor was a non-assenting and opposing creditor—a circumstance to which FitzGerald, J., attaches great weight. The same was the case in *Moran* v. *Reynolds* (1) and, as Mr. Justice Holmes points out, the actual decision in *Smith* v. *Simmonds* (2) is rather against the contention of Mr. Carton.

Upon the whole, looking to the anomalies and injustice which would follow from holding that the creditor was remitted to a debt in part or (it might be) in the whole barred, I think the better decision is to apply the reasoning of Bramwell, B., to this case. As we are at liberty to treat the pleadings as amended, the form in which this principle can be made applicable is not material. I think, however, it is not necessary to plead this matter specially, and that it can be used as in any case where an action for a simple contract debt is brought and a promise exists sufficient to take the case out of the Statute. Here again the case of *Irving* v. *Veitch* (3) applies.

Another ground suggested during the argument for getting rid of the Statute of Limitations was to hold the period covered by the arrangement proceedings up to the default, as excluded from the six years. I do not think this course legally possible, and no authority was cited for the proposition that the running of the Statute could be thus suspended.

I think the appeal must be dismissed.

Fitz Gibbon, L. J.:—

I think the principle laid down by Bramwell, B., referred to by the Lord Chancellor, should apply, unless there is something in our Irish Legislation to prevent it, and I cannot find anything to that effect. Under the Irish statutes and decisions, when the arrangement breaks down the creditors are "remitted to their original rights." That must mean that then, and thereupon, the old debts are *payable*, and, if payable, they must at that moment be payable notwithstanding the Statute of Limitations.

I believe that there is no such thing known to the law of

(1) Ir. R. 3 C. L. 353. (2) 8 L. R. Ir. 357. (3) 3 M. & W. 90.

limitations as a period which runs for a while, stops like a clock, and then goes on again from where it stopped. If there be "a false start" in the case of the Statute of Limitations, I think that the full time must always be run over again. But, however this may be as a general rule, in this case, in my opinion, the old debt became payable when the arrangement broke down, and it has not been barred since.

BARRY, L. J., concurred.

Solicitors for the plaintiff: *M'Gillycuddy and Morphy.*
Solicitor for the defendant: *Defendant in person.*

G. Y. D.

IN THE MATTER OF THE ESTATE OF FLORINDA BATESON, A VENDOR OF LAND (1).

Appeal. 1895. Oct. 31. Nov. 1, 25.

Rentcharge—Statute of Limitations—Advance by Land Commission to enable tenant to purchase holding—Land Law (Ireland) Act, 1881, *sect.* 24, *sub-sect.* 1 (*a*), *sect.* 28—*Purchase of Land (Ireland) Acts*, 1885 *to* 1891 —*Sale carried out by conveyance.*

A perpetual annuity of £300 a-year was charged on certain lands, but no payment on foot thereof was made after the 3rd May, 1881.

On the 18th December, 1888, an originating statement, under Rule 2 of the Rules under the Land Purchase (Ireland) Acts (of the 5th December, 1887), was lodged by the owner of the lands for the purpose of selling to the tenants, but in the schedule of incumbrances annexed to the statement no reference was made to the annuity. Agreements for sale of portions of the lands were subsequently lodged, which stated that it was proposed to carry out the sales by means of conveyances, and the applications for advances were sanctioned in 1889. On the 10th September, 1894, the orders sanctioning the advances were rescinded, and the application for advances under the aforesaid agreements were dismissed, and fresh agreements, which had been entered into under the Purchase of Land (Ireland) Act, 1891, applying for advances of the same nominal amount in Guaranteed Land Stock as had been previously sanctioned in cash, and proposing to carry out the sales by vesting order, were lodged.

(1) Before LORD ASHBOURNE, C., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

Appeal. 1895.

In re BATESON'S ESTATE.

On the 10th September, 1894, orders were made sanctioning the several advances applied for. In the final schedule of incumbrances no mention was made of the annuity of £300 a-year, and the annuitant having filed an objection :—

Held (1), that the original proceedings for sale which commenced on the 18th December, 1888, terminated with the order of the 10th September, 1894, and that the fresh agreements and the orders sanctioning advances under them, dated the 10th September, 1894, were separate and distinct; (2) that the principle of *In re Colclough's Estate* (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) is not applicable to sales by the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891, where the sale is proposed to be carried out by conveyance; and that consequently the claim to the annuity was barred by the Statute of Limitations.

THE case is reported in the Court below in [1895] 2 Ir. R. 559, and from that decision G. M. Harris appealed.

Meredith, Q.C., and *W. M. Jellett*, for the appellant.

Sect. 10 of the Purchase Act of 1885 confers on the Land Commission the jurisdiction and powers of the Landed Estates Court, including those under sect. 64 of the Landed Estates Court Act, which provides for the distribution of the purchase-money. Once that is so, the decisions of *Colclough's Estate* (1) and *Nixon's Estate* (2) apply to a sale by the Land Commission, and prevent the Statute of Limitations from running, as the Court is bound to distribute the purchase-money rightly. On the 10th December, 1888, the originating statement for sale of the lands was filed. On the 16th March, 1889, a supplemental statement by way of abstract of title was filed. On the 23rd December, 1889, all the agreements with the tenants were lodged, and on the 2nd August, 1889, the order was made sanctioning the agreements. On the 28th August, 1894, six agreements with the tenants were lodged, applying for advances of land stock of the same amount as the cash proposed to be advanced under the former agreements for sale. On the 10th September, 1894, orders were made cancelling the old agreements of 1888, and new agreements for sale under the Act of 1891 were made. These sales were to be carried out by vesting order, and the only difference between these new agree-

(1) 8 Ir. Ch. R. 330. (2) Ir. R. 9 Eq. 7.

ments and the old ones was that instead of the purchase-money being all in cash, it was partly in land stock. By the General Order of the Land Commission, dated the 20th October, 1891, sales were to be carried out by vesting order. From that date this matter became a proceeding by vesting order. We submit that this is still the old proceeding for sale to these tenants by the landlord, and not an entirely new contract: *Irish Land Commission* v. *Davies* (1).

By sect. 9, sub-sect. 4, of the Act of 1885, the Land Commission are bound to give notice to incumbrancers before completing the sale. Once it became a vesting order case, the whole of the provisions of sect. 10 of the Act of 1885 apply. An order sanctioning an advance in a case to be carried by vesting order, has the same effect as a conditional order for sale in the Landed Estates Court: *Vickery* v. *Deane* (2).

A Court of Equity is a trustee of money left in its hands: *Howlin* v. *Sheppard* (3).

If the decision of the Court below is right, then all that a vendor of land through the Land Commission has to do is to delay for some years in lodging a statement of incumbrances, and an incumbrance will be lost.

J. Walker Craig, Q.C., and *Wakely*, for Mrs. Bateson.

The 28th August, 1894, was the date of the agreements upon foot of which the money has been lodged. No one had any interest in, or could have interfered with, this contract, except the landlord and the tenant. It was the contract between them that effected the sale, and not the order of the Land Commission.

But the new agreements made a fresh start and cancelled the old. There must be a starting point, and when asked what it was, the counsel for the appellant gave two answers—(1) the date of the order of the Land Commission sanctioning the advance, or (2) the 20th October, 1891, when the General Order was made by the Land Commission. The order sanctioning the advance cannot stop the statute running; it is simply an order by the Land Commission that they have agreed to make the advance, and the landlord and tenant may go on and carry out the transaction on

(1) 27 L. R. Ir. 334. (2) 32 L. R. Ir. 36. (3) Ir. R. 6 Eq. 38.

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that basis. The order of the 20th October, 1891, is not a General Order, it is simply a direction as to the course of business.

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By sect. 14, sub-sect. 2, of the Act of 1887, it was provided that the Land Commission might, after making an order under sub-sect. 1 (viz. that incumbrances should attach to the purchase-money and cease to affect the land), and notwithstanding that it was agreed that the sale was to be carried out by conveyance, exercise the powers in sect. 9, sub-sect. 5, of the Purchase Act of 1885. Even if such an order as the Commission is empowered to make by sub-sect. 1 could stay the operation of the statute, no such order was made here until the twelve years had completely run.

Nov. 25.

LORD ASHBOURNE, C.:—

This is an appeal from the Land Commission, overruling an objection of George Michael Harris, and holding that the annuity which he claimed was barred by the Statute of Limitations.

By deed of the 30th April, 1879, the Honorable Florinda Bateson, the vendor, granted to Elizabeth Kennedy, her heirs, executors, administrators, and assigns, an annuity of £300 payable out of certain lands in the county of Limerick. Elizabeth Kennedy died on the 3rd May, 1887, intestate as to this annuity, which devolved upon her heir-at-law, now represented by the objector. No payment in respect of the annuity has been made since the 3rd May, 1881, and the vendor contends that it is barred by the Statute of Limitations, twelve years having elapsed since the date of the last payment. The *onus* rests on the objector to give a satisfactory answer to this argument of the Statute of Limitations.

Counsel accordingly contend that the proceedings for sale in the Land Commission have arrested the operation of the Statute of Limitations, and they have appealed to the authority of the cases of *In re Colclough's Estate* (1), and *In re Nixon's Estate* (2). According to these cases, an order for sale in the Incumbered Estates Court, or in the Landed Estates Court, was to be considered as made on behalf of every person interested in the proceeds of the sale, and persons thus interested were saved from

(1) 8 Ir. Ch. R. 330. (2) Ir. R. 9 Eq. 7.

the obligation of taking steps to prevent the bar of the statute. Mr. Justice Bewley held that these authorites did not apply to the Land Commission, and on the dates and facts decided that the objector was barred by the Statute of Limitations.

I concur in the result of the decision, but I wish to make the grounds of my judgment plain in order to avoid possible misconception in future cases. As long as, under the different Acts of Parliament cited, the sales were carried out by conveyance, they were strictly *inter partes*, and nothing occurred to arrest the running of the Statute of Limitations against any incumbrancer. This was admitted before us by the learned counsel for the objector, though I infer from the report of the case in the Court below (1), it was there contested. The main argument addressed to us was, that when sales were to be carried out by vesting orders, the authorities already referred to applied, and arrested the operation of the Statute of Limitations. The facts of the case on this point appear to be as follows, taking them from the judgment of Bewley, J. :—"Agreements for the sale of portions of the lands comprised in the originating statement were subsequently" (*i.e.* in 1888) "lodged, and the agreements as well as the originating statement stated that it was proposed to carry out the sales by means of conveyances . . . On the 10th September, 1894, apparently by consent of the parties, the orders sanctioning the advances were rescinded, and the applications for advances under the agreements before mentioned were dismissed, and fresh agreements which had been entered into under the purchase of Land (Ireland) Act, 1891, applying for advances of the same nominal amount in Guaranteed Land Stock as had been previously sanctioned in cash, and proposing to carry out the sales by vesting order, having been lodged, orders were made also on the 10th September, 1894, sanctioning the several advances applied for."

Mr. Meredith contended that it was really all to be regarded as one transaction, and that it could not then be divided into, 1, an agreement for sale by conveyance; 2, an agreement for sale by vesting order; but I do not feel at liberty to go behind the

(1) [1895] 2 Ir. R. 559.

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statement of Mr. Justice Bewley, which was quite unchallenged in the opening of the case.

If contracts to be carried out by conveyance are out of the case, and if the second contracts were only entered into on the 10th September, 1894, it is manifest that the Statute of Limitations had then run, and the annuity was barred. Bewley, J., however, said in his judgment:—"The objector cannot be in a better position than if the sales had been carried out by conveyance in the manner originally proposed." If this implies that exactly the same considerations apply to the arguments addressed to us whether the procedure is by conveyance, or by vesting order, I desire to reserve my judgment in the matter for much further consideration.

Without going through the sections in detail, I desire to note that where sales are to be carried out by vesting orders great powers are given to the Land Commission by the 10th section of the Land Purchase Act, 1885, and with great powers, great duties and responsibilities. I wish also to point out the vast powers conferred on the Land Commission by section 14 of the Land Law (Ireland) Act, 1887, and the duty and obligations cast upon them to see that the purchase-money reaches the right hands and that "rights and priorities" are duly examined, weighed, and adjudicated on. By sub-sect. 1 of that section, it is enacted that:—"The Land Commission may, if they think fit, pay into the Bank of Ireland the whole or any part of the amount of the advance to such credit as they may direct, and in any case where the tenant provides any portion of the purchase-money may cause the same to be paid to the like credit, and may by order declare that the claims of all persons (except the tenant and persons claiming under him) who are interested in the land sold, whether as incumbrancers or otherwise, shall attach to the purchase-money of such land in like manner as immediately before the sale they attached to the land, and shall cease to be of any validity as against the land, and subject as in this Act mentioned shall be discharged or redeemed out of the purchase-money, and the Land Commission shall determine the rights and priorities of the landlord and such other persons, and shall distribute the purchase-money in accordance with such rights and

priorities." Thus the Land Commission takes charge of the money, rules and adjudicates on "rights and priorities," and all persons possessed of "rights and priorities" are entitled to expect care, caution, and knowledge in the distribution. I desire entirely to reserve my opinion when sales are carried out by vesting orders, as to whether at some point of time—whether the date of the approval of the contract, or of the vesting order, or some earlier or later date—incumbrancers are not entitled to rely on the Land Commission to have regard to their interests, and at such point of time to have the operation of the Statute of Limitations against their claims stayed and arrested. I wish absolutely to reserve my opinion upon this subject until it comes before us in some case when its decision may be necessary. However, for the reasons earlier mentioned, I am of opinion that the order appealed from is right, and should be affirmed, and this appeal dismissed with costs.

Fitz Gibbon, L.J. :—

On the dates, the demand was barred before any proceedings for sale, to be carried out by vesting order, became applicable. I concur with the Lord Chancellor on that ground. I reserve for future decision whether at any, and if so, at what stage of a proceeding by vesting order, the Land Commission becomes charged with all the duties, as well as with all the powers, of the Landed Estates Court, with the consequence of arresting the running of the Statute of Limitations, because the Court has become the guardian of all the rights attached to the property which has passed under its jurisdiction. But I do not admit the proposition that, at any stage of a proceeding by vesting order, the Purchase Commissioners, when exercising the powers of the Landed Estates Court, are mere lenders or distributors of public money, freed from any responsibility to see that those to whom they pay it are entitled to it, or that they can treat such money as if it was paid into Court in a common law action, to be paid out, without inquiry, to any party to the action, merely as such.

Barry, L.J. :—

I concur with the Lord Chancellor and Fitz Gibbon, L.J., for

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the reasons they have given. I reserve the question as to whether the principle of *Colclough's Estate* (1) and *Nixon's Estate* (2) applies to the case of a sale by the Land Purchase Commission to be carried out by vesting order, for future consideration, if ever it arises.

Walker, L. J.:—

It is only the importance of this case, alleged and actual, which justifies me in adding anything to the judgments which have been delivered. At the date of the passing of the Act of 1885, where there was an agreement for sale by a landlord to a tenant of his holding, it might be carried out in one or other of three ways—(1) by application to the Landed Estates Court in a proceeding analogous to the vendor and vendee proceedings, as to the effect of which, on the point we have to consider, it is unnecessary for me to express an opinion; (2) by completion out of Court; and (3) by negotiation and completion through the medium of the Land Commission. These two last were the subject of conveyance and were carried out through the medium of it. The Act of 1885 introduced a new proceeding in section 8, not superseding the others, but capable of being adopted at will. It is thus prefaced—"When a holding has been sold by a landlord to a tenant *and it has been agreed between the Land Commission and the landlord and the tenant* that such shall be carried into effect by means of a vesting order of the Land Commission under this Act," the Land Commission *may if they think fit*, after due investigation of title, and being satisfied therewith, make an order vesting the holding in the purchaser. That proceeding is as effectual as a Landed Estates Court conveyance, and by sub-section 5 of section 9 where the same conditions of agreement, that the sale shall be carried into effect by vesting order, exist, they may make it at any time after application for it, and then, "unless and so far as the vesting order shall otherwise declare, the rights and claims of all persons in respect of the estate sold or any incumbrance, or annual charge thereon, shall, *from the date of such vesting order*, be transferred to the purchase-money."

(1) 8 Ir. Ch. R. 330. (2) Ir. R. 9 Eq. 7.

Applying these sections to the facts of this case, I find a clear declaration that from the 12th February, 1895, the date of the vesting order, the claim of the appellant annuitant was transferred to the purchase-money. The language of these sections, giving discretionary power to make the vesting order and fixing the date when the transfer of the claim to the purchase-money takes place, will be most important when the large question of the Statute of Limitations and the date, if any, of its ceasing to run arises, in a case where the agreement mentioned in section 8 exists. Further, by section 10, subject to the same conditions of agreement, the Land Commission is clothed with the powers and duties of the Land Judges, including section 64, which provides that "the purchase-money shall, under the order of the Court, be applied in or towards payment or satisfaction of the incumbrances or charges, if any, which affect such land or part thereof according to their priorities." Turning to the *ratio decidendi* of *Colclough's Estate* (1), I take it from the judgment of the Chief Baron in *Wade's Estate* (2) at p. 526, where he says—"The principle of *Colclough's Estate* (1) and *Nixon's Estate* (3) is that an absolute order for sale in the Landed Estates Court is made on behalf of every person who has an interest in the proceeds of the sale." [The Lord Chief Baron read section 64, and proceeds]: "As the charges which are to be paid under the 64th section must include those from which the conveyance under the 61st section discharged the lands, any charge on land (although not an incumbrance within the 1st section) which is not within the 62nd section (and thereby excepted from the discharging operation of the conveyance) must be a charge within the 64th section, and its owner has by reason of it an interest in the proceeds of the sale within the rule in *Colclough's Estate* (1) and *Nixon's Estate* (3)."

Then comes sect. 14 of the Act of 1887, which, I think, in effect provides that after the agreement for sale, and such investigation as satisfies the Land Commission that landlord and tenant are *prima facie* entitled to carry it into effect, and after agreement for advance made, the Land Commission (even when the agreement is to be carried out by conveyance) "may by order declare that

(1) 8 Ir. Ch. R. 330. (2) 13 L. R. Ir. 515. (3) Ir. R. 9 Eq. 7.

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the claims of all persons (except the tenant and persons claiming under him), who are interested in the land sold whether as incumbrancers or otherwise, shall attach to the purchase-money of such lands in like manner as immediately before the sale they attached to the land, and shall cease to be of any validity as against the land, and subject as in this Act mentioned, shall be discharged or redeemed out of the purchase-money." And this order being made, they become clothed with all the powers conferred by section 9, notwithstanding a conveyance be the agreed form. This is a most natural provision, because all the substance of the vesting order had been attained by the judicial order pronounced. Again I say, where, but only where, such a judicial order exists, a serious question will arise whether such an order may not furnish a starting point for the cesser of the statute. But it is not necessary to express any opinion on this, for it is not contended that such an order was made. If the conclusion of Bewley, J., be only that the order sanctioning an advance (whether the sale is to be carried out by conveyance or vesting order) is not, to use his own words, "an adjudication that the land shall be converted into money and the money applied in the discharge of the then existing incumbrances," I think there is great reason for such conclusion. If, as the closing words of his judgment would seem to import, his opinion be that the character of the proceedings, as one *inter partes*, remains all through after vesting order or equivalent judicial pronouncement, then speaking for myself I should require, when the case arises, much argument in support of such a view.

In the case before us, it is not contended that the statute would cease to run in cases where the sale is agreed to be, and is, carried out by conveyance. But it is argued (admitting that an agreement to carry out by vesting order must exist) that such an agreement exists here, and of a date, actual or imputed, sufficient to bring in the doctrine of *Colclough's Estate* (1). There are seven of these agreements, and the same observations apply to all. On the 5th October, 1888, an agreement was entered into by the owner with Thomas Cahill for the sale of 106A. 2R. 18P. of the lands

(1) 8 Ir. Ch. R. 330.

of Croagh, which he held at the rent of £66, at the price of £1,010, all rent was to be paid up to the 1st of May, 1888, and after that interest was to be paid. Until the purchase-money was paid the landlord was to provide the guarantee deposit of £202. Then follows the statement—"The sale shall be carried out by means of a conveyance." On the 23rd of December, 1889, this was sanctioned with the owner's consent for £850; this sale was for cash, but on the 12th July, 1894, an agreement for sale was entered into with *Patrick* Cahill for £850 in land stock, the tenant paying interest from the date of the agreement, the first payment to be made in six months after, *i.e.* on the 12th January, 1895; and it says, "The sale shall be carried out by means of a vesting order." If not carried out, the tenant was to be liable for rent as if the agreement had not been made, and payments on account of interest were to be deemed on foot of rent. On the 10th September, 1894, the advance was sanctioned, and on the 10th September, 1894, it was ordered by the Court that the above order of sanction, dated the 23rd December, 1889, be rescinded, and the within applications for an advance be dismissed. The vesting order was executed on the 12th February, 1895. In two of the cases the sales are to different people, the obligations of interest are different, and there is the cardinal distinction which goes to the root of jurisdiction, that the one is to be by conveyance and the other by vesting order.

The way the appellant seeks to get out of the difficulties thus presented is this: first, it is said the statute did not run till 1893, that the direction of the 20th October, 1891, taken in connection with the fact that no attempt was made to induce departure from it shows an agreement to carry out the sale by vesting order. I disagree with that argument both in fact and law. There is nothing to show final acquiescence, and the making of the actual agreements of 1894 is against it. Further, I think such conduct, while the agreements of 1888 remained subsisting, could not amount to the condition of agreement mentioned in section 8 of the Act of 1885, which I have already read.

Next it was contended that the agreements of 1894 are to be treated as incorporated with those of 1888, and to be really continuations of them, and referable to them by date. But that is

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impossible. The cardinal feature of "conveyance" appears in one, and that of "vesting order" appears in the other, and further those of 1888 ceased to exist under the orders of the 10th September, 1894, and the applications under them were dismissed. As I have said new rights arose in respect of interest, and in two cases there are new parties. There was nothing in law to prevent the making of new agreements, and in fact new advances were sanctioned. There is a declaration by competent parties, adopted and carried out by Court orders, that the rights shall be referable to the agreements of 1894.

Finally, it was pressed that though dated in 1894, they are in a case, as it was called, which started in 1888. I decline to give to the originating statement, which is the creature of a rule, the character of a petition for sale in the Landed Estates Court. Further, the basis of it was an application to carry out sales by conveyance. The originating statement states — "that it is intended that the sales herein shall be carried out by means of conveyances, and the said Florinda Bateson desires that this statement shall be received by the Irish Land Commission as the basis for carrying out the said intended sales." It was on that basis advances were sanctioned, and it was not until 1894 there was even a prospect of the case assuming a form which would affect the incumbrances. But I am not to be taken as expressing an opinion that the date of the originating statement, or sanction of advance, would be taken in any case as the point from which the running of the statute would cease. I am of opinion that the agreements for sale, to be carried into effect by vesting order, had no existence till 1894 when the 12 years had already run, and therefore irrespective of the question whether such agreements or sanction of advances under them would be the starting point, there is nothing in the facts of this case which would justify us in applying the analogy of *Colclough's Estate* (1), and the cases which follow and explain it.

I concur in the dismissal of the appeal with costs.

Solicitor for the objector: *Ross Todd.*
Solicitor for the vendor: *E. C. Jameson.*

R.D.M.

(1) 8 Ir. Ch. R. 332.

CURRAN *v.* MIDLAND GREAT WESTERN COMPANY OF IRELAND.

Ex. Div. 1895. Nov. 1, 2, 20.

Carriers —Railway Company—Special conditions exempting from liability, except for wilful neglect or misconduct—Non-delivery of goods—Burden of proof— Obligation to feed animals during transit —Implied request — 41 & 42 *Vict. c.* 74, *s.* 33.

Pigs were delivered for carriage from Sligo to Manchester under a special contract at a reduced rate subject to a condition exempting the carrying Company from all liability (including liability for loss, injury, or delay), unless occasioned by the intentional and wilful neglect or misconduct of the Company's servants acting within the scope of their authority. On the lot arriving at Manchester some of the pigs consigned were not forthcoming. On the trial of an appeal in a civil bill action for the loss thus sustained by the consignor, the Company contended that on proof of the special contract they were entitled to a dismiss, without giving any evidence as to why or how the missing pigs were not delivered.

Held, on case stated by the Judge of Assize that this contention could not be sustained, and that the plaintiff on the facts proved was entitled to a decree.

Where it is the custom of a Railway Company to feed animals consigned to them for carriage at the expense of the consignor during delay in transit, a request under the 41 & 42 Vict. c. 74, s. 33, will be implied, and the Company incurs liability for any loss occasioned by leaving the animals unfed.

CASE STATED for the opinion of the Court, pursuant to 27 & 28 Vict. c. 99, by Mr. Justice Gibson, as follows:—

This case came before me at Sligo Summer Assizes, 1895, on appeal by defendants from a decree by the County Court Judge for £18 15*s.* in respect of certain pigs. No question is to be raised on the pleadings, which are to be amended if necessary.

1. The question raised relates to two classes of claims. The plaintiff, a pig-jobber, consigned pigs to be carried by the defendants to Manchester on several occasions, always signing a contract note, which is to be deemed part of this case (1).

(1) The following is a copy of the special condition in the contract relied on by the Company, the plaintiff having elected to book at the reduced rate:—

"The Company undertake the conveyance of animals at the reduced rate

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2. In case of two consignments, namely, on the 30th November and the 17th December, 1894, the pigs so consigned were delivered in Manchester, one short. The value of each pig was £2. The total claim on this head is £4.

3. The defendants gave no evidence to show why or how these two pigs were not delivered, but contended that they were protected from liability by the conditions of the signed contract.

On behalf of the plaintiff it was submitted that the matter lay peculiarly within the knowledge of the defendants; that the *onus* lay upon them of bringing themselves within the condition; that the non-delivery of the pigs might have been occasioned by misdelivery, which would be an act of conversion, or by some other tortious act; and that the defendants must give some account of the disappearance of the pigs before they could rely on the condition. No case was cited on either side.

4. The other subject of claim relates to £7, the loss sustained by reason of pigs which were delivered in Dublin not having been fed by the defendants for over two days. The pigs reached Dublin on the 29th December, and were put into the Company's yard that morning. There was not room on the 12.30 p.m. or 8 o'clock boats, and they were detained over Sunday, the 30th. They were forwarded on Monday, and reached Manchester on Tuesday. They got no food when in defendants' custody, and were thereby reduced in condition.

According to the usual course of dealing, corn is provided for them by the Company, and paid for by the consignor. The Company contended that they were under no obligation to feed the pigs.

The plaintiff argued that for the period after 12.30 p.m. on Saturday they were bound to feed.

It is to be taken that the Company by their servants knew that the pigs required to be fed.

stated above solely on the condition that they shall be free from all liability (including liability for loss, injury, or delay) whether in the loading, unloading, transit, or conveyance of animals, or while in the vehicles of the Company, or on their premises, unless such injury or delay shall be occasioned by the intentional and wilful neglect or misconduct of their servants acting within the scope of their authority."

This case is stated at the instance of the defendants.

If there were on the above facts sufficient grounds to justify a decision in favour of the plaintiff, I held that there ought to be such a decision.

The question for the opinion of the Court is whether the defendants are responsible for the sum of £4 and £7, or either, and which of them.

J. G. GIBSON.

Fetherston-H. (with him *The Right. Hon. The Mac Dermot, Q.C.*, and *R. E. Meredith, Q.C.*), for the defendant Company (appellants) :—

The facts proved would be evidence of negligence, but not of wilful misconduct. [Counsel cited several authorities; but having regard to the view expressed by the Lord Chief Baron, it is not considered necessary to set them out.]

J. W. Hynes, for the plaintiff (respondent) :—

The *onus* of proving intentional and wilful misconduct of the Company's servants does not lie on the plaintiff. When the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it: Taylor on Evidence, p. 353. The *onus* of proving that their servants were not guilty of intentional negligence, would lie on the Company, but the Company gave no evidence whatever: Bevan on Negligence, last ed., p. 708, and the cases therein cited.

Cur. adv. vult.

PALLES, C.B. :—

Nov. 20.

[Having stated the facts as given above, his Lordship proceeded :—]

As to the second claim, which I shall take first, viz., that arising out of the omission to feed the pigs detained in Dublin, there is no difficulty. The 41 & 42 Vict. c. 74, s. 33, imposes a duty upon a Railway Company to feed animals during transit, upon the request of the owner; and although in the present case there was no actual request, there is, in the previous course of dealing between the plaintiff and the Company, ample evidence of an implied request. As to this portion, therefore, of

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the plaintiff's claim, we are of opinion that the defendants are responsible.

The question raised as to the residue of the claim is of a more difficult character; and it is one the practical importance of which cannot be exaggerated. If ruled in favour of the defendants, it will render it difficult, if not indeed almost impossible, to try in Civil Bill Courts a large number of the small disputes which every day arise between the owners of goods, on the one hand, and carrying Companies who use such conditions as we have here on the other. I say this, because in the Civil Bill Courts there is no power to interrogate; and as the amount of expenses which there is jurisdiction to allow cannot exceed £5 for any one witness, there would be in many cases a want of jurisdiction to allow sufficient expenses to cover the actual sums which the plaintiff would be obliged to pay to the Company's own servants when they come from distant parts of England and Scotland, and whom, upon the hypothesis supposed, it would be the plaintiff's duty to produce. This in itself would be a grievous mischief; but further, if the plaintiff, who by this decision was driven to sue in the High Court, recovered a sum not exceeding £5—a limit which would not be exceeded in many cases—the Court, whatever might be the form of action, would be without jurisdiction to give him more than half his actual costs.

I mention these circumstances, not as matters which can influence our decision, but as imposing upon us the duty of most careful consideration before we arrive at a conclusion which would be fraught with such consequences.

In determining the question of law before us, I may state at the outset that, in our opinion, none of the cases to which we have been referred during the argument by the defendants' counsel rule the present one. In all of them the actual facts, so far as they were known to the defendants, appear to have been proved; and the question was whether, *from the state of facts so disclosed*, the inference of wilful misconduct or intentional negligence could have been drawn. In none of those cases, nor in any cases of which I am aware has it yet been held that a Company carrying under such conditions as we have here is entitled to say to the consignee of goods which it has accepted

for carriage: "We absolutely decline to give you any account of your goods: it is true we received them to be carried and delivered to you; it is true we did not deliver them; but we absolutely decline to give any reason whatever. We may know, or may not know, the reason we did not deliver, but we decline to tell you whether we know or not. We may have, or may not have, the property in our possession, but whether we have or not is no concern of yours, and we shall not say. We remain absolutely silent, and we say the law entitles us to remain silent; and that the receipt of cattle or goods under such a contract as this does not require us to give any answer for their non-delivery in due course, or at all.".

It is apparent, from my view of the cases cited, that the determination of this question must rest upon the due application to the facts of the present case of the well settled principles of evidence. But before proceeding to apply them I wish, in the first instance, to simplify the case a little, and by removing out of it some considerations which appear to be of no value, to reduce the question to its narrowest limits.

The contract here was to carry from Sligo to Manchester; and although not proved, I am willing to assume what I know to be the fact, that it included carriage from Sligo to Dublin, over the defendants' railway; from Dublin to some port in England, by a steamer not belonging to the defendants; and from that port in England to Manchester by another line of railway, not belonging to the defendants. But it is admitted by the defendants (and in my opinion with perfect propriety), that as far as their liability is concerned, and for the purpose of our decision, the case must be treated identically as if the steamer and the railway upon the other side of the channel were their property.

Again, it is a considerable distance from Sligo to Manchester; but the principles of law which we have to apply must be the same, whether the contract of carriage be from Sligo to Manchester, or from Sligo to the next station on the defendants' line. There is no difference between the principles applicable to the two cases. The distinction is one of degree only. Again, I have to observe that the question here is not as to the weight of the evidence, which is a matter of fact, as distinct from the question of law, is

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there any evidence at all? Therefore the proposition to which the defendants ask us to assent is this:—Suppose the contract was for carriage from Sligo to the next station on the defendants' line of railway, under such conditions as we have here, and that the defendants delivered some only of the pigs when they arrived at such next station, are the defendants on proof of these facts at liberty to say: "We refuse to explain what became of the other pigs or tell you anything about them."

Now, is that the law? I have considered the question according to the strict principles of the law of evidence; and, applying one well-known doctrine, that is, that a state of facts once proved to have existed is presumed, in the absence of evidence to the contrary, to continue, I have arrived at a clear opinion that the above question must be answered in the negative. I view the matter in this way: the pigs, notwithstanding their delivery to the defendants, remained the property of the plaintiff, and continued to be his, unless and until some event happened, such as their absolute destruction by fire or otherwise, or the sale of them in market overt, or some other act which would have divested the property. All these events are such as are not to be presumed without evidence; and the evidence of any of them, if any such be relied upon, ought to come from the defendants.

I say, therefore, that we have evidence here from which we may presume that at the time at which the defendants refused to deliver the pigs, they were in existence *in rerum naturâ*, and were the property of the plaintiff.

Next, the pigs having been received into the possession of the defendants, there is a *primâ facie* presumption that they continued to be in their possession until the contrary is shown, or until a different presumption arises from the nature of the subject—neither of which states of fact exists here.

Lastly, the defendants failed to deliver some of the pigs, and allege no excuse.

These circumstances, in my opinion, are evidence from which a jury would be warranted in holding as matter of fact that the defendants had the pigs in their possession. If that inference in fact were drawn, then I hold as matter of law that their unaccounted-for refusal to deliver them, so continuing

in their possession, upon the plaintiff's demand for them at the place and time at which they ought to have been delivered—of which there is ample evidence—amounted to wilful misconduct, for which this action will lie.

Upon this short ground, I am of opinion that there is evidence of the defendants' liability in respect of the non-delivered pigs.

It is to be understood that I do not express any opinion as to the extent of the explanation which, in such cases as the present, it is incumbent on the Company to give. Whether it will be sufficient for them to prove the mere fact that the pigs ceased to be in their custody; or whether they must go further, and prove the circumstances under which such change of custody occurred, is a question which it will be time enough to determine when the circumstances of any particular case demand its decision. In the present case it does not arise.

We therefore answer the question put to us by Mr. Justice Gibson in the affirmative as to both sums of £4 and £7; and the defendants must pay the costs.

Hynes, on behalf of the plaintiff, asked that the costs might be allowed on the higher scale.

The Lord Chief Baron (after consulting with the other members of the Court)—Yes, certainly.

ANDREWS and MURPHY, JJ., concurred.

Solicitor for the plaintiff: *T. H. Williams.*
Solicitor for the defendants: *J. Kilkelly.*

J. P. B.

Land Com. 1896. Jan. 14.

THOMPSON, Tenant; CLELAND, Landlord (1).

Landlord and tenant—Tenancy from year to year—Subsequent agreement before 1881 *that landlord might take up premises for building purposes—Letting for temporary convenience—Land Law (Ireland) Act,* 1881 (*44 & 45 Vict. c.* 49), *s.* 58 (7).

In considering whether a holding was let for the temporary convenience or to meet a temporary necessity either of the landlord or tenant within section 58, sub-section 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49) regard must be had to what were the subsisting terms of the letting at the passing of the Act.

In January, 1871, the landlord of agricultural lands, held from him under a tenancy from year to year, and situate in a locality in which a demand had sprung up for sites for residences, made an agreement with the tenant by which the landlord was to be at liberty at any time, and without any formal notice, to take up possession of the lands, and to grant leases thereof for building or for any purpose whatsoever, except farming leases, the landlord making a reduction in the rent and a payment for taking possession. On an application by the tenant to have a fair rent fixed:—

Held, that regard should be had not only to the original terms of the contract of letting, but to the special terms introduced by the subsequent agreement; and, the Court being of opinion, under the circumstances, that at the time the Act of 1881 came into operation, the holding was let for the temporary convenience of the landlord:—

Held, that the originating notice should be dismissed.

This case, heard at Belfast, on the 19th December, 1895, was in the list for judgment. The facts and the questions involved will appear from the judgment of Bewley, J.

R. F. Harrison, for the tenant.

Hume, for the landlord.

Bewley, J.:—

The tenant's originating notice to fix a fair rent in this case

(1) Before Bewley, J., and FitzGerald, Q.C., Commissioner.

was dismissed by a Sub-Commission, on the ground that the holding was let for the temporary convenience of the landlord.

The holding, which contains 16A. statute measure, is held under a tenancy from year to year at the yearly rent of £7 17*s.* 4*d.*, and is subject to certain special conditions to which I shall presently refer. The holding is situate near the sea coast in the county of Down, about a mile from Bangor, in a locality in which there has been a good deal of building of recent years. Owing to the advance of Belfast in population and prosperity the demand for sites for villa residences in this district appears to have commenced so far back as the year 1870, or previously, and about that time, Mr. Richard Rose Cleland, the predecessor in title of the present landlord, entered into such agreements with a number of the tenants from year to year of agricultural holdings on his estate as would enable him to take up the whole or part of their holdings whenever required for building purposes. On the 14th January, 1871, he entered into an agreement of this nature with Charles Thompson, the predecessor in title of the present tenant, and although the agreement has been lost or mislaid since the hearing of this case before the Sub-Commission, its provisions have been clearly established by secondary evidence.

It recited that Richard Rose Cleland was about to let the whole or part of the farm held by Charles Thompson for building purposes: that to enable him to obtain possession it would become necessary that a notice to quit should be served, and an ejectment brought; and that for the purpose of obviating this necessity it had been agreed between the parties that Charles Thompson would allow Richard Rose Cleland at any time to take possession of all or any part of the said lands for building purposes upon the terms and conditions thereinafter mentioned, and without serving any notice to quit or bringing any ejectment, or taking any action at law, for the purpose of obtaining possession of the said lands or any part thereof; and it witnessed that the said Charles Thompson did thereby for himself, his executors, administrators, and assigns, agree with the said Richard Rose Cleland, his heirs and assigns, that he the said Charles Thompson did thereby authorise and empower the said Richard Rose Cleland, his executors, administrators, and assigns, at any

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time thereafter, and without any formal notice whatsoever to enter upon and take possession of all or any part of the said lands, trespass free, and to grant leases thereof for building or for any purpose whatsoever, save and except farming leases, at any time or times he or they might think proper: and the said Richard Rose Cleland on his part did thereby agree with the said Charles Thompson, that he, the said Richard Rose Cleland, his heirs and assigns, would make a rateable deduction per acre in the rent payable by the said Charles Thompson, for all or any portion of the lands which he might so enter and take possession of as aforesaid, and also would pay to the said Charles Thompson the sum of £5 per acre for entering upon and taking possession of his said lands as aforesaid.

Evidence was given before us that a number of fee-farm grants of parts of the Cleland estate in this neighbourhood for the purpose of erecting villa residences thereon had been made from time to time from 1870 to last year, and that in fact, of 104 acres of the estate, all had been let for building purposes except 36 acres, and it was also proved that the present holding had been the subject of a proposal or of negotiations for letting for the purposes of building.

Under these circumstances two questions appear to arise: 1, are the conditions embodied in the contract of tenancy by the agreement of 1871 to be taken into consideration in determining whether the holding was let for the temporary convenience of the landlord? and, if so, 2, was the holding let for the temporary convenience of the landlord?

On the first point it was contended by counsel for the tenant that as the tenancy in the holding now subsisting was created before the agreement of the 14th January, 1871, and was at its inception an ordinary tenancy from year to year without any restrictions or qualifications the holding had not been "let for the temporary convenience of the landlord" within the meaning of sub-section (7) of section 58 of the Land Act of 1881. But in considering whether a holding was "let to be used wholly or mainly for the purposes of pasture" within sub-sections (3) and (4) of that section, or was "let for the temporary convenience or to meet a temporary necessity either of the landlord or tenant" within

sub-section (7), it appears to me that regard must be had to what were the subsisting terms of the letting at the time the Land Act of 1881 was passed. If, for example, a tenant by a lease executed in 1870 had covenanted that he would at all times during the term keep 95 acres out of a holding of 100 acres in pasture, and the landlord in 1880 had executed a release of the covenant to the tenant to the intent that the holding might be used for tillage or pasture as the lessee should think fit, the holding would not, in my opinion, at the passing of the Land Act of 1881, have been a holding "let to be used mainly for the purpose of pasture" within sub-sections (3) or (4) of the section referred to: and for the same reason, if terms were incorporated in a tenancy prior to the passing of the Land Act of 1881 that would bring it within one of the classes of tenancies excluded from the fair rent provisions of the Act; the holding cannot be treated as coming within the Act merely because the excluding elements did not exist in the original letting.

In the present case, therefore, we must have regard not only to the original terms of the contract of letting but to the special terms introduced by the agreement of 1871.

The second question seems to me to be free from doubt.

The existence of a power of resumption by the landlord or a power of surrender by the tenant in a contract of tenancy does not necessarily prove that the holding was let for the temporary convenience of the landlord or tenant, as the case may be, but it is often important evidence of the purpose of the letting, and, if associated with other circumstances, it may help to show that the letting was of a temporary character. In *Butterly* v. *Carroll* (1) and *Whisker* v. *Delacherois* (2) a certain part of the demised lands was defined or appropriated by the landlord as building ground, and a power of resumption was reserved in respect of it. Hence, that part was held by the Court of Appeal to have been let for a temporary purpose. In the present case the agreement of January, 1871, evidences by its express terms that the entire of the holding was appropriated by the landlord for building ground, and it appears to me that upon the principle of the cases referred to, and

(1) 26 L. R. Ir. 93. (2) 25 Ir. L. T. R. 34.

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other cases of a similar nature, we are bound to hold that at the time the Land Act of 1881 came into operation the holding was let for the temporary convenience of the landlord.

The appeal therefore will be dismissed with costs.

Solicitor for the tenant: *J. S. Mahon.*

Solicitor for the landlord: *A. N. Charley.*

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Jan. 20.

ROBINSON, TENANT; WAKEFIELD, LANDLORD (1).

Landlord and tenant—Lease made in 1828—*Subletting—Consent by agent to assignment reciting possession of undertenants—Receipts for rent and payments for privilege of subletting—Landlord at the time tenant for life—Consent in writing of heir or assign of lessor—Tenant in occupation—Subletting Act* (7 *Geo.* 4, *c.* 29), *s.* 3—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 57.

The tenant under a lease made in 1828, and to which the provisions of section 3 of the Subletting Act, 7 Geo. 4, c. 29, applied, purported without deed or written instrument to make sublettings of portions of the holding. By deed made in 1862 the landlord's estate was settled in trust for W., who was heir-at-law of the original lessor, and his assigns, for his life, with remainders over. The tenant was charged an additional rent for the privilege of having the subtenants, and in receipts for rents given in 1866 and 1867 by the agent of W. there was an item of 15*s.* for six cottiers. In an assignment made in 1878 of the tenant's interest the lands were described as in the actual possession of the tenant and his undertenants, and a consent signed by the agent of W. was indorsed thereon. In 1883 and 1889 fair rents were fixed on the applications of some of the subtenants.

In an application after the death of W. to have the fair rent of the holding fixed:—

Held, that W. was competent to give the consent to the sublettings required by 7 Geo. 4, c. 29, s. 3, either as heir or assign of the lessor; that there was evidence that the sublettings were made with his express consent; that his consent could be given through his agent; and that the receipts coupled with the terms of the assignment of 1878, and the consent endorsed thereon, sufficiently testified in writing the landlord's consent to the sublettings.

(1) Before BEWLEY, J., and FITZGERALD, Q.C., Commissioner.

Held, also, distinguishing *Stevenson* v. *Parker* ([1895] 2 I R. 504) that the Court would, if necessary, under the circumstances of the case presume a lost consent in writing by W. to the sublettings.

THIS case, which was heard at Belfast before Bewley, J., and FitzGerald, Q.C., on the 19th December, 1895, now appeared in the list for judgment. The judgment of Bewley, J., fully states the facts and questions involved.

R. F. Harrison, for the tenant.

Hume, for the landlord.

BEWLEY, J.:—

This is a sequel to a former case between the same parties, in which, in pursuance of an order of the Court of Appeal, the tenant's originating notice to fix a fair rent was dismissed, on the ground that he was not in occupation of a substantial part of the holding. The decision of the Court of Appeal is reported in 30 L. R. (Ir.), pp. 547, *et seq.*

The holding contains about 57 statute acres, and is held under a lease dated the 29th February, 1828, made by Thomas Christy Wakefield, senior (the grandfather, and a predecessor in title of the present landlord), to James Woodhouse for two lives (one of which is still in being), or a term of thirty-one years, at the yearly rent of £60.

The lease having been made while the Act 7 Geo. 4, c. 29, was in force, the lessee could not make a valid assignment or subletting without the *express* consent of the lessor, his heirs, executors, administrators, or assigns, testified, where such assignment or subletting should be by deed or written instrument, by his or their being party to and signing and sealing such deed or written instrument, or by his or their written indorsement on such deed or instrument, ratifying or confirming the same, or where such assignment or subletting should not be by deed or written instrument, testified by his or their consent in writing (section 3 of the statute).

In the interval between the execution of the lease and the

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month of April, 1878, the lessee made, or purported to make, several sublettings of houses with small plots of land attached; and these sublettings were made without any deed or written instrument.

In the year 1865 there were six such cottier sub-tenants on the holding, and these included John Wylie, who had a house and about 2 acres of bog, at a rent of £4 a-year; Samuel Corner, who held a house and 1A. 2R. of land, at a rent of £4 a-year; and — M'Farlane, who had a house and 1A. 3R. 20P. of land, also at a rent of £4 a-year. At this time the interest under the lease was vested in Thomas A. Woodhouse, a son of the original lessee, and the then landlord, Thomas Christy Wakefield, junior, appears to have charged the lessee an additional rent or sum of 15*s.* per annum for the privilege of having these cottier tenants. In a receipt dated the 18th January, 1866, given by the then agent of the estate, Mr. John B. Doyle, for a year's rent of the holding, due the 1st November, 1865, there is an item of 15*s.* for six cottiers. A similar charge is made in the receipt of the 5th January, 1867, for the year's rent due the 1st November, 1866; and according to the evidence of Mr. Thomas A. Woodhouse the same charge was continued so long as he remained in occupation of the holding.

In 1878 the holding was sold by a mortgagee of the lessee's interest, and was purchased by John Robinson, the present tenant, for a sum of £465. By a deed dated the 24th April, 1878, the interest under the lease was assigned to John Robinson, by all necessary parties, the holding being described as "that farm, tenement, and parcel of land in Derryean, otherwise Derrinraw, together with all houses, and buildings thereon, as the same was formerly in the possession of James Woodhouse, deceased, and now in the actual possession of Thomas Atkinson Woodhouse, *and his undertenants.*"

The assignment was made with the consent of the landlord, Thomas Christy Wakefield, junior, and to testify the consent the following endorsement on the deed of assignment was executed by Mr. John B. Doyle, the agent of the estate: —

"I, John B. Doyle, of Bessbrook in the county of Armagh, Esq., agent for Thomas Christy Wakefield, Esq., owner of the lands

demised by the within recited lease, do by these presents under my hand and seal consent to the sale and alienation of the grantee's interest in said lease, and to the conveyance thereof to John Robinson of Clovenden, in the county of Armagh, farmer: Provided that this consent shall apply only to the alienation herein mentioned, and shall not license any alienation by the said John Robinson, his heirs, executors, or administrators, save only as is allowed by the within recited lease. Dated this 29th day of April, 1878.—JOHN B. DOYLE."

Mr. John B. Atkinson acted as solicitor for the vendors in this transaction, and appears to have made some statements to John Robinson in reference to the rents payable by the cottier tenants as an inducement to him to purchase, but Mr. Atkinson, though he afterwards became land agent for the present landlord, and may have acted previously for the then landlord, Mr. Thomas Christy Wakefield, as solicitor in some matters of business, was not in any sense agent for the landlord in respect to the sale of the lessee's interest to John Robinson; and any statements or representations made by him on this occasion could not affect the landlord.

Between the date of this assignment and the month of October, 1887, four sublettings of portions of the holding were made by John Robinson, at rents amounting in the aggregate to £13 12*s.* 6*d.* a-year, three of them being in fact relettings of small holdings in the hands of cottier tenants at the time of the execution of the assignment. The present landlord became aware of these sublettings, but did not express any consent or dissent in respect of them by writing or otherwise.

On the 7th December, 1883, Samuel Corner, one of the sub-tenants whose tenancy was created before 1865, obtained an order from the Land Commission, fixing the fair rent of his holding at £2 15*s.*; and on the 5th February, 1889, an order was made on the application of Lucinda Robinson, limited administratrix of Jeremiah Robinson, in whom M'Farlane's holding had become vested, fixing the fair rent of that holding at £1 15*s.* The old rent in each of these cases appears from the originating notices, and the orders fixing the judicial rents to have been £4 per annum at the time the proceedings were taken.

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On the 31st October, 1887, an originating notice was served by John Robinson to fix a fair rent of the holding comprised in the lease of the 29th February, 1828. At that time, and until after the hearing in the Court of Appeal, there were seven sub-tenants on the holding: three, viz.—John Wylie, Samuel Corner, and Jeremiah or Lucinda Robinson, holding under sub-tenancies existing at the time of the execution of the assignment of the 24th April, 1878, and the remaining four subtenancies subsequently created.

The decision of the Court of Appeal was based solely on the existence of these latter subtenancies. With respect to the former the following passages occur in the judgments of the members of the Court:—At p. 554, of 30 L. R., Ir., Lord Ashbourne, C., expresses himself thus:—

"It appears that from time to time, from the making of the lease till the year 1878—a most important date in the case—various sublettings of his holding were made by the tenant, though without any written consent on the landlord's part. The importance of the date, 1878, is this, that in that year Thomas Atkinson Woodhouse, who then owned the lessee's interest, assigned the lands by deed to the respondent with the consent of the landlord's agent to the assignment testified by the requisite endorsement. In the deed of assignment to which the landlord so consented, the lands were described as being 'in the actual possession of Thomas Atkinson Woodhouse and his undertenants,' and we have been pressed in the argument to hold that it would be unreasonable to allow the landlord to invalidate the tenant's right to go into the Land Commission in respect of any sublettings which occurred antecedent to this transaction. In this contention I entirely agree. I do not think it is competent for the landlord to rely on any of the antecedent sublettings so as to impose any disability on the tenant. I therefore confine my judgment to what occurred between the 24th April, 1878, the date of the assignment, and the 31st October, 1887, the date when the tenant served his originating notice seeking to get the benefit of the Land Act passed in that year."

At page 559, the Lord Chief Baron says:—"I divide the sub-tenancies here into two classes, those created—(*a*) before, and (*b*) after the assignment of 1878.

"As to the first class, I entertain the clearest opinion that the landlord by consenting in writing to that assignment (by which the lands were granted expressly subject to existing tenancies), estopped himself from alleging that such subtenancies were not valid in law. I desire, however, to guard myself against determining, although in favour of the tenant I assume, that such estoppel involves the further estoppel that the sublettings were made with his consent within the meaning of section 57 of the Land Act of 1881. It may be that it would do no more than estop him from alleging that the lands were held under a lease prohibiting subletting without consent; but as the facts of this case do not necessitate the determination of that question here, I prefer not to express any opinion upon it. I put wholly out of consideration all the subtenancies created prior to the date of the assignment."

And at page 562, Barry, L.J., states:—"In the present case, as was intimated at a very early stage of the argument, we are all of opinion that as regards the sublettings made here prior to the assignment of 1878 it is impossible for the landlord to rely upon these sublettings as a reason for excluding the tenant from the benefit of the Land Law (Ireland) Act, 1887. It has been contended that the conduct of the present landlord's predecessor in title, followed by the assignment assented to by the present landlord himself, has amounted to a complete release of the benefit of the 7 Geo. 4, c. 29, so far as regards subletting. But I confess that I am unable to accept that argument as well founded. I am of opinion as regards all that occurred before the assignment of 1878, that if there were breaches of the Subletting Act they were condoned; not that the provisions of the Act were effaced or abrogated in any way, but simply that the present landlord and his predecessor in title have put themselves into such a position that the Court should not permit them to rely upon these sublettings as a ground either of attack or defence."

The original originating notice having been dismissed on the ground that the sublettings after April, 1878, had been made without the consent of the landlord, the tenant not unnaturally concluded that if he could get rid of these subtenancies the way would be clear to him to have a fair rent fixed. He accordingly, shortly

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after the decision in the Court of Appeal, got up possession of the four small holdings, the aggregate yearly rents of which were £13 12*s.* 6*d.*, and the houses in which the four subtenants lived are now vacant and falling into decay. John Wylie, Samuel Corner, and Lucinda Robinson still continue in occupation of their holdings, and Wylie acts as herd for John Robinson.

On the 30th April, 1894, a fresh originating notice to fix a fair rent was served, and the case having come before a sub-Commission an order was made on the 5th August, 1895, fixing the judicial rent at £34. Notices requiring the case to be reheard were served on behalf both of landlord and tenant, the grounds for prosecuting the rehearing stated in the landlord's notice being that the holding does not come within the Land Acts of 1881 or 1887, and that the rent fixed ought to be increased. The real ground, however, on which the landlord sought to impeach the order of the sub-Commission was the same as that put forward on the hearing of the original application to have a fair rent fixed, viz.: that the tenant is not in *bona fide* occupation of the holding within the meaning of the Land Acts. On behalf of the tenant it was argued by Mr. Robert Harrison that this question was practically concluded by the judgments of the members of the Court of Appeal in the former case, and this would undoubtedly be so if no additional evidence had been given in the present case. But Mr. Hume as counsel for the landlord gave in evidence a deed of family settlement, dated the 13th February, 1862, which raises questions of importance and difficulty that were not, and could not have been considered by the Court of Appeal in the former case.

This deed was made between Thomas Christy Wakefield, junior, of the 1st part; Thomas Dixon and Thomas Carleton of the 2nd part; and Edward Thomas Wakefield, the landlord in the present case, the eldest and only surviving son of Thomas Christy Wakefield, junior, of the 3rd part; and by this deed, as also by a prior deed of the 14th March, 1842, certain lands therein mentioned, including the lands of Derrinra (which comprise the holding in this case) were settled in trust for Thomas Christy Wakefield and his assigns during his life, and immediately after the determination of that estate in trust for Edward Thomas

Wakefield and his assigns during his life with divers limitations over.

Thomas Christy Wakefield, junior, at the time that he by his agent testified his consent to the assignment of the 24th April, 1878, was but tenant for life of the reversion, and the estate in the lands of the present landlord is not derived out of any interest possessed by his father when the assignment was executed. Though Thomas Christy Wakefield may have been estopped by his conduct from disputing the validity of the sublettings made prior to the assignment or from alleging that they had been made without the consent of the landlord for the time being, the present landlord, who was not a party to the acts that gave rise to that estoppel, nor a privy in estate, cannot be held bound by the estoppel. The expressions of opinion of the Judges of the Court of Appeal to which I have referred, based on an estoppel arising from the conduct of Thomas Christy Wakefield, and delivered when the deed of settlement was not in evidence, cannot therefore be regarded as an adjudication on the questions that have been raised in the present case.

In my opinion it is necessary for the tenant to establish that the existing sublettings are trivial within the meaning of the 4th section of the Land Act of 1887, or that they were made with the consent of the landlord within the provisions of the 57th section of the Land Act of 1881, or that the present landlord is estopped from alleging that the sublettings were made without consent.

I do not think the sublettings can be regarded as trivial. As I have already stated, it appears from the proceedings in Samuel Corner's and Lucinda Robinson's cases that the rent payable in respect of each of these holdings was £4 per annum; and thus the total rent from the three existing sublettings was £12 a-year before a reduction was made by the Land Commission. The tenancies have been admittedly in existence for at least thirty years, and though the area comprised in the holdings of the subtenants is small, an annual contribution of £12 a-year derived out of so small a portion of the holding would be a matter of substance to a tenant whose rent was £60 a-year.

In dealing with the question of consent, this Court of course is bound to act on the decision of the Exchequer Division in *Bow-*

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man v. *Catherwood* (1) approved of, and followed by Walker, C., in *Smyth and Donaghey* v. *Edie* (2), and to hold that if a tenant who is not in actual occupation of the entire of his holding claims to be constructively in occupation by virtue of the provisions of the 57th section of the Land Act of 1881, he must establish that any subletting which he alleges was made with the consent of the landlord was a subletting valid in law. Either he or a predecessor of his must have sublet and not merely have purported to sublet.

There is no suggestion in this case that any consent in writing was given by the present landlord, and we have had therefore to consider whether there was such a consent by Thomas Christy Wakefield, junior, as would satisfy the requirements of the statute 7 Geo. 4, c. 29.

That Thomas Christy Wakefield, junior, though only tenant for life of the reversion was competent to give the necessary consent is, I think, reasonably clear. Under the terms of section 3 of the Act, the consent must be that of the lessor or contracting party in the lease or contract "his or their heirs, executors, administrators or assigns." Thomas Christy Wakefield, junior, was the "heir at law" of the lessor in the lease of the 29th February, 1828, though his title to the reversion was not acquired in that capacity, and was also in my opinion an "assign" within the meaning of the statute.

There appears also to be sufficient evidence to lead to the conclusion that the three sublettings in question were made with the express consent of Thomas Christy Wakefield, junior. The payment to him of 2*s.* 6*d.* per annum for each of the cottier tenants, including Wylie, Corner and M'Farlane, evidences that either the sublettings were originally made with his express consent or were subsequently sanctioned by him. Whether this consent is testified by "his consent in writing" within the meaning of the statute is a question of greater difficulty. I apprehend that the consent would not be less *his*, though given through his agent. Mr. John B. Doyle appears to have had authority to give the necessary statutory consent on Thomas Christy Wakefield's behalf to the assignment of the 24th April, 1878, and the receipts of the 18th January, 1866, and the 5th January, 1867, coupled with

(1) 28 L. R. Ir. 572. (2) 27 Ir. L. T. R. 86.

the terms of the deed of assignment and indorsed consent appear to me to sufficiently testify in writing the landlord's consent to the sublettings. If this is not such a consent as the statute requires, we are quite prepared to presume that a consent in writing by Thomas Christy Wakefield to the three sublettings was duly given but has been lost. No formal consent would be necessary. A letter from the landlord to the agent expressing his consent would be enough. I do not think that we are precluded by the decision of the Court of Appeal in *Stevenson* v. *Parker* (1) from making such a presumption. The presumption in the present case is founded on the acts and conduct of the party against whom it is sought to be established. The demand and payment for a number of years of an annual sum, for the privilege of having these cottier tenants, and the consent to an assignment showing on the face of it the existence of the subtenants, followed by a long course of dealing between the lessee and the subtenants founded on the existence of the relation of landlord and tenant, appear to me to raise a presumption that Thomas Christy Wakefield, junior, had consented to the creation of these subtenancies in the mode prescribed by law. The three subtenants or their successors in title have been in possession of their holdings for upwards of thirty years; two of them have had judicial rents fixed, and every reasonable presumption ought, I think, to be made to validate the existing state of things.

If the present landlord's contention is right, there was no jurisdiction to fix judicial rents in respect of the subtenancies, and if he had intervened, the originating notices of the subtenants should have been dismissed. But by lying by and abstaining from expressing any objection to the sublettings, he has induced John Robinson to believe that they had his sanction and to materially alter his position with regard to the subtenants. If before the judicial rents had been fixed the landlord had declared his objections, if any, to the existence of the subtenancies, and made the case that they had been created without the consent of himself or his predecessor, John Robinson might have prevented the subtenants from having fair rents fixed and might have evicted them, as he has now

(1) [1895] 2 Ir. R. 504.

Land Com. 1896.

ROBINSON, *Tenant*; WAKEFIELD, *Landlord.*

got rid of the subtenants whose tenancies were created after the assignment of 1878, and have obtained clear possession of the entire holding.

Bewley, J.

But it is impossible for him now to take that course; he would be estopped from questioning the validity of the tenancies of the subtenants who have had judicial rents fixed, and it appears to me that on the principles laid down in *Cairncross* v. *Lorimer* (1) and similar cases, as well as for the other reasons I have already stated, the objections taken on behalf of the landlord to the fixing of a fair rent in this case ought not to be allowed to prevail.

Solicitor for the tenant: *A. T. Farrell.*

Solicitor for the landlord: *Wellington Young.*

D. M'C. M.

Appeal. 1894.

Jan. 25, 30.

AGNEW *v.* THE BELFAST BANKING COMPANY AND MARIA CLANEY (2).

(1892. No. 3061.)

Donatio mortis causa—*Deposit receipt—Suicide—Public policy.*

The owner of a deposit receipt gave the document to her sister under circumstances such that the jury found that it was so given in contemplation of death which was to be effected by suicide, and that the gift was to take effect only in the event of the donor's death.

Held (affirming the decision of the Exchequer Division), that the gift under such circumstances did not constitute a valid *donatio mortis causa.*

Quaere—Can there be a valid *donatio mortis causa* when the donor at the time of the donation is in good bodily health?

APPEAL from an order of the Exchequer Division, dated the 3rd May, 1893, whereby judgment was directed to be entered for the plaintiff as against the defendant Maria Claney.

The action was brought by Robert Agnew, as administrator of Jane Claney, otherwise Agnew, deceased, against the Belfast Banking Company for the sum of £200 lent to them by the said

(1) 3 Macq. H. L. 827, 829.

(2) Before WALKER, C., PORTER, M.R., and FITZGIBBON and BARRY, L.JJ.

Jane Claney, deceased, and 5*s.* 11*d.* interest thereon, and against the defendant Maria Claney for trover and detinue of a deposit receipt for the said sum of £200, and for £50 money, had and received for the plaintiff's use.

The defendant Maria Claney traversed the detinue and the conversion of the deposit receipt; denied that it was the property of the plaintiff, and paid £36 11*s.* 1½*d.* into Court in respect of the claim for money had and received.

The Belfast Banking Company, on an affidavit stating that they admitted their liability on the deposit receipt, but that both the plaintiff and Maria Claney had claimed to be paid the sum due on foot of it, obtained an interpleader order, whereby it was directed that, on their lodging in Court to the credit of the action the sum due on the deposit receipt, less by £6 6*s.* as and for costs of action and motion, all further proceedings against the said Belfast Banking Company should be stayed, and that an issue should be tried upon the trial of the action wherein the said plaintiff Robert Agnew should be plaintiff, and the said Maria Claney should be defendant, the question on the trial of such issue to be, "whether the said Robert Agnew or the said Maria Claney is entitled to the said sum of £200 and interest, less by the said costs as aforesaid."

The action came on for trial before Mr. Justice Harrison and a common jury of the City of Dublin, on February 10, 1893, whereupon it was agreed between the plaintiff and Maria Claney that the sum paid into Court by the defendant Maria Claney should be accepted by the plaintiff in full discharge of the cause of action for money had and received by the said defendant for the use of the plaintiff.

The trial of the other cause of action and of the issue then proceeded. It was proved that the deposit receipt was given by the Bank to Jane Claney for money admitted to be her own, on May 7, 1892. The plaintiff married Jane Claney on May 12, 1892. Previously to the marriage Jane Claney and her sister, Maria Claney, had lived together at Bangor (Co. Down). After the marriage the plaintiff and his wife lived at Balloo, three miles from Bangor. On May 16, 1892, Jane Agnew returned to her sister Maria, at Bangor, and slept there. She had a box which

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she had left in her sister's house, and of which she kept the key. On the morning of May 17 the plaintiff came to Bangor, saw his wife, and borrowed some money from her to pay his rent. He then went away, leaving his wife and her sister together. What next happened was thus described by Maria Claney at the trial:—"After he left, my sister went upstairs and brought down this deposit receipt (produced). She said to me that she thought it was going to take a great deal of money to do him. She said nothing more but signed the deposit receipt. I saw her write her name on it. She then brought over the deposit receipt and gave it to me. I was sitting in the room when she gave me the deposit receipt. She handed it to me and said, 'Maria, that is yours: if anything should happen to me, that is yours in God's Name.' She said nothing more. I took the deposit receipt from her, but not in a hurry. I said to her, 'Jane, what are you doing that for?' She just said, 'That is yours, for and be sure and look it up.' I then went up to my room. She followed me, and stood by me whilst I locked the deposit receipt in my own box. She saw me do it. Nothing more was said. She left me about two o'clock that afternoon; her husband came for her, and they left together." It was proved that at the time when she gave the deposit receipt to her sister, Jane Agnew was in good bodily health, and so continued until she became suddenly ill, and died on the night of May 21, 1892, it being agreed by the respective counsel on both sides that the verdict of the jury on the inquisition to inquire into the cause of death of the said Jane Agnew, and the several depositions made therein, should be received and entered in evidence on the trial of the issue. These several depositions contained the evidence on which the coroner's jury found "that the said Jane Claney Agnew did commit suicide by taking an irritant poison while in a state of temporary insanity, and died on May 21, 1892, at Balloo Lower. No blame can be attached to any person." After Jane Agnew's death a letter addressed to the defendant Maria Claney was found in the deceased's box in the defendant's house. The letter was written, and the envelope in which it was enclosed, was directed in the deceased's handwriting. Maria Claney at the trial swore that she knew nothing of the letter till she found it after her sister's death. The letter was

admitted in evidence at the trial not as a will, nor as an incomplete will, but as written after the alleged gift, and forming portion of the entire transaction. It was as follows:—"May 17. Dear Maria. This is my will. I gave you the cheque, and I leave to wee Jenny the £50 in this box and the other, what is left to pay my funeral expenses. I leave to Jenny my knitted quilt and everything that is useful to her; but you can do as you please. I was foolish to get a home. Do not forget Mrs. Heaman and Miss Heaman—what you like. I have sheets in the box in Balloo, and my knitted quilt; be sure and get them; get everything belonging to me. . . . The Lord will forgive me, I hope, for taking away my life, for I cannot live any longer. So good-bye, Maria dear." There was evidence that the deceased thought she was involved in expense by her marriage; but there was no dispute between her and her husband, and they had lived happily together. It was proved that the deceased had purchased poison on May 21, 1892.

At the conclusion of the evidence counsel for the plaintiff asked for a direction on the ground—(1) That there cannot in law be a *donatio mortis causa* when the death in alleged contemplation is a death by suicide; (2) that there can be no *donatio mortis causa* where the donor at the time of the alleged donation is in good bodily health: *Hedges* v. *Hedges* (1); (3) that there was not any evidence to show that at the time the transaction took place Mrs. Agnew was in such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event. Counsel for the plaintiff further submitted that there was no case or evidence to go to the jury of a *donatio mortis causa*, because the gift apparently was an out-and-out gift purporting to pass the property; and further, that there was no contemporaneous evidence, or rather the reverse, that the donor had death in contemplation at the time of the gift, and he objected to any question being left to the jury.

The Judge declined to direct, and left the following questions to the jury:—

1. Did the late Jane Agnew indorse, give, and hand over to the defendant the deposit receipt in question?

(1) Prec. Ch. 269.

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2. If so, was same indorsed and handed over in contemplation of death?

3. If so, was it a death by suicide?

4. Was same given or handed over to take effect in the event of Jane Agnew's death and then only?

All these questions were answered by the jury in the affirmative; and on these answers the Judge directed the jury to answer the question directed by the said issue, "that the said Maria Claney was entitled to the said sum;" and the jury did so answer, and found for the said Maria Claney, as against the said Robert Agnew, on the counts of detinue and trover and conversion. The Judge abstained from giving judgment, and left the respective parties to move the Court as they might be advised; but he ordered that the sum of £36 11*s.* 1½*d.*, lodged in Court by Maria Claney, should be paid out of Court to the plaintiff.

On May 2, 1893, the plaintiff applied to the Divisional Court that judgment be entered for the plaintiff against Maria Claney for the sum of £200 5*s.* 11*d.*, and for the return of the deposit receipt mentioned in the pleadings, and for the costs of the action and issue, including £6 6*s.* paid to the Belfast Banking Company, or in the alternative, that the finding of the jury might be set aside, and a new trial ordered on the grounds of misdirection by the learned Judge, the reception of illegal evidence, and that the findings were against the evidence and the weight of evidence. On this application the Exchequer Division (PALLES, C.B., and MURPHY, J.) being of opinion that there was not a valid *donatio mortis causa* of the deposit receipt, ordered judgment to be entered for the plaintiff, as against the said Maria Claney, for the sum of £200, the amount of the deposit receipt sued for, and also the return of the deposit receipt with his costs of the action, of the issue, and of this application; and further ordered that the sum of £194 2*s.* 4*d.*, lodged in Court by the Belfast Banking Company, should be paid out to and accepted by the plaintiff in part discharge of his said judgment in the action for £200 and costs.

From this order the present appeal was taken.

Gordon, Q.C., and *Campbell, Q.C.* (with them, *Hume*), for the appellant:—

It is not necessary that the donor should be actually sick at the time when the *donatio* is made in order to constitute a valid *donatio mortis causa;* it is enough if the gift is made by the donor in contemplation of a conceived approach of death. In *Tate* v. *Hilbert* (1) there was no evidence of any particular illness: the passage in Bracton De Legibus Angliae, Lib. ii., fol. 60, recognises that a valid *donatio mortis causa* might be made though the donor was not suffering from illness or disease:—"*Mortis causa donatio potest esse multiplex, ut si quis contemplatione, vel suspitione mortis, alicui dat, cujus modi donationes saepe fiunt ab aegrotantibus, vel ab eis qui in aciem sunt ituri, vel per mare navigaturi, vel peregre profecturi, et in se tacitam habent conditionem, ut hujus modi donationes revocentur: si aegrotus convaluerit, si miles ab acie redierit, si nauta a navigatione, et peregrinus a peregrinatione.*" Justinian Institutes, Lib. ii., Tit. vii. sect. i., shows that there may be a good *donatio mortis causa* when any fatal accident befalls the donor. The passage is "*mortis causa donatio est propter mortis fit suspicionem; cum quis ita donat ut, si quid humanitus ei contigisset, haberet is qui accipit.*"

[BARRY, L.J. I do not think that "*si quid humanitus ei contigisset*" means, "if any fatal accident befalls the donor."]

That is the way Sandars translates the passage. In Kent's Commentaries on American Law, vol. ii., p. 575, n. (*a*) a case, *Nicholas* v. *Adams* (2), is cited in which "it was held not to be indispensable to a valid *donatio mortis causa* that it should be made *in extremis*, like a nuncupative will. The Chief Justice defined it to be a conditional gift, depending on the contingency of expected death, and that it was defeasible by revocation, or deliverance from the peril. To constitute a *donatio mortis causa*, the circumstances must be such as to show that the donor intended the gift to take effect if he should die shortly afterwards, but that if he should recover, the thing should be restored to him." Roper on Legacies, vol. i., p. 3, also recognises that a gift made in danger of death from causes other than existing illness, and to take effect in case the giver dies, is a good *donatio mortis causa*. Swinburne Wills, vol. i. p. 57, defines a *donatio mortis causa*, as

(1) 2 Ves. Jun. 111; 4 Bro. C. C. 286. (2) 2 Wharton, 17.

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"when any being in peril of death doth give something, but not so that it shall be presently his that received it, but in case the giver do die." In *Hill* v. *Chapman* (1) the gift was made by the donor in good health, and a considerable time before his death, and yet was held good as a *donatio mortis causa*. Sir Thomas Plumer, M.R., states in *Walter* v. *Hodge* (2) that "it is not necessary that the donation should be in the last illness, it is sufficient if made in contemplation of death."

Here, the deceased was not insane at the time of delivery of the deposit receipt to her sister; the finding of the coroner's jury is only that she was insane at the time she destroyed herself: the true account of the matter is that the deceased gave this deposit receipt to her sister in dread of the approach of a fit of self-destructive insanity; this gift was to be effective only in the event of the donor's death. The finding of the coroner's jury negatives all felonious intention on the part of the donor. In the present case relief is sought by the representative of a voluntary donor, on the naked ground of the illegality of the donor's intention and purpose: the Court will not assist a plaintiff under such circumstances: *Ayerst* v. *Jenkins* (3).

Meredith, Q.C., and *R. F. Todd*, for the respondent:—

I. We assume that deceased was sane when she made the gift and insane when she committed suicide—

If on the day of the delivery of the deposit receipt the deceased was in good health there was no valid *donatio mortis causa*: it is essential for the validity of gifts of this kind that they should be made by the donor in his last illness: *Blount* v. *Burrow* (4), *Hedges* v. *Hedges* (5); "if a gift be not made by the donor in peril of death *i. e. with relation to his decease by illness affecting him at the time of the gift*, it cannot be supported as a donation *mortis causa*." Williams on Executors, p. 681, 682 (edition 1893), citing *Tate* v. *Hilbert* (6), *Gardiner* v. *Parker* (7), *Edward* v. *Jones* (8). In the present case, as in *Edward* v. *Jones* (8), there is a complete want

(1) 2 Bro. C. C. 612.
(2) 2 Swanst. 92; see at p. 100.
(3) L. R. 16 Eq. 275. [72.
(4) 1 Ves. Jun. 546; 4 Bro. C. C.
(5) Prec. Ch. 269.
(6) 2 Ves. Jun. 111.
(7) 3 Madd. 185.
(8) 1 M. & Cr. 236.

of evidence to show that at the time at which the transaction took place, the donor was in such a state of illness, or expectation of death, as would warrant the supposition that the gift was made in expectation of that event. Again if the donor made the gift in contemplation of suicide, being then sane and subsequently became insane, and committed suicide, the death contemplated was not the death that happened and the gift fails: *Staniland* v. *Willott* (1).

II. If the donor was insane at the periods of gift and death, the gift is plainly bad. This is probably the true view of the case on the facts. The letter written the day of the gift shows that the gift and the death were all parts of one and the same plan.

III. It would be impossible to hold the defendant entitled if the deceased was sane both when she gave the deposit receipt and when she committed suicide, because then to make the gift valid it must have taken effect upon a felony.

Death by suicide lacks an element which has always been present where the gift has been held to constitute a valid *donatio mortis causa*. In all decided cases and in all the text writers the gifts which are stated to be valid are gifts made in the hope of recovery from impending illness, or escape from imminent peril. When the deceased made this gift, so far from hoping to avoid death, she relied upon and courted death in order to give her gift effect.

Ayerst v. *Jenkins* (2), was a wholly different case. There, in addition to the laches which barred his claim, the personal representative of the donor had no legal estate in the property which he sought to recover by impugning the act of the donor. The legal estate in the property was absolutely vested in trustees ten years before the action was brought, for the benefit of the sole defendant. Here the legal interest in the deposit receipt is in the plaintiff: even if there is a good *donatio mortis causa* its true operation is to pass only an equitable interest to the defendant: *Cassidy* v. *Belfast Banking Company* (3), *Duffin* v. *Duffin* (4).

Cur. adv. vult.

(1) 3 Mac. & G. 664.
(2) L. R. 16 Eq. 275.
(3) 22 L. R. Ir. 68.
(4) 44 Ch. Div. 76.

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Jan. 30.

WALKER, C. :—

This appeal arises out of a trial of an issue between Robert Agnew and Maria Claney as to the title to a sum of £200 represented by a deposit receipt, and it involves the question whether an alleged *donatio mortis causa* made by the late Jane Agnew to her sister Maria Claney is valid or not. Robert Agnew is the administrator of the donor and was her husband.

The case must proceed on the findings of the jury. They are :—1, that the deposit receipt was given and handed over in contemplation of death; 2, that this death was a death by the suicide of the donor ; 3, that it was given to take effect in the event of the donor's death, and then only.

There is no doubt that there is here a subject-matter capable of being the subject of a *donatio mortis causa*, and also that there is sufficient evidence to establish a gift in fact and delivery. It appears that on May 17, 1892, Jane Agnew signed and handed over to her sister a deposit receipt for £200, saying at the time, "Maria that is yours ; if anything should happen to me, that is yours in God's name." On May 21, she killed herself by taking poison. A letter in the poor woman's handwriting of May 17, makes painfully clear her determination. A coroner's inquest had been held, and it was agreed at the trial "that the verdict of the jury on the inquisition to inquire into the cause of death and the several depositions therein should be received and entered in evidence on the trial of the issue." The finding of the jury at the inquest was that Jane Agnew committed suicide while under the influence of temporary insanity.

There is much reason for assuming, and I should be prepared (if so at liberty) to draw the inference that if the lady was insane when she committed suicide, so also was she insane when she formed the purpose to commit the act. But on this hypothesis it was so obvious that no *donatio* could exist that the claimant's counsel preferred to argue the case on the assumption that when she made the gift on May 17, she was of sound mind, and that she sanely and deliberately contemplated at a near period self-destruction and that the gift was made to take effect on that event and on that event only.

It is necessary to state what are the admitted incidents which attach to a *donatio mortis causa*—I leave out of view that incident which was so much controverted in this case—1. It is incomplete during the life of the donor; 2, it may be revoked by him at any time before death: in the words of Lord Cottenham in *Edwards* v. *Jones* (1), "a *donatio mortis causa* leaves the whole title in the donor, unless the event occurs which is to divest him"; 3, it must be accompanied by delivery, and in some cases the validity of the gift may be tried in an action of trover; but there may be a good *donatio mortis causa* of an instrument which does not pass by delivery, and then the executors of the donor are trustees for the donee for the purpose of giving effect to the gift, and the trust may be enforced against them: *Duffield* v. *Elwes* (2), *Duffin* v. *Duffin* (3); 4, and if the donor recovers from the condition of contemplation of death—I put it advisedly in that way to cover the contention of the appellant—the inchoate gift comes to an end; 5, the death of the intended donee before the donor has the same effect on it.

This entire incompleteness of the donee's title till the event happens makes immaterial the knowledge or ignorance of the donee, and I may here say that it is in my opinion very difficult to apply the definition given by Justinian, which is stated out of several to be the correct one, to a contemplation of suicide or death by suicide at all. The words "*quae propter mortis fit suspicionem*" seem inapplicable to one who does not apprehend death, but voluntarily seeks it; and the words "*si quid humanitus ei contigisset*" seem to mean "should anything happen to him human and mortal as we are."

During the argument I said that I did not think our law would ever attribute such a contemplation of self-destruction as would found a gift. When is it to take place? Will the law fix a reasonable time for a man killing himself? But independent of all this, and on a higher ground I think that a gift is utterly void as against public policy which is to take effect on and not until the commission of a felony by the giver, and that felony of the highest form: for we know the terrible consequences which English Law

(1) 1 M. & Cr. 235. (2) 1 Bli. (N. S.) 497. (3) 44 Ch. Div. 76

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imposed on a *felo de se*. If this had been a bond reciting the contemplation of suicide and making the £200 payable on the obligor committing suicide, could his executors have been sued on it? *Egerton* v. *Brownlow* (1) is but an illustration of many cases to be found in the notes to *Collins* v. *Blantern* (2). This in effect the Exchequer Division have decided, and it is sufficient for our judgment.

It is not necessary for me therefore to express an opinion on the question to which so much argument was directed, whether the true rule governing *donationes mortis causa* is to be found in the judgment of Lord Cowper in *Hedges* v. *Hedges* (3), and the statement of the law in Williams on Executors, or in the passages read from Bracton, who published about the middle of the thirteenth century his compilations from the Civil law, extending the object of such a gift to every danger, whether from sickness or battle or a sea-voyage or travel, or even some powerful person's cruelty or hostility, winding-up "*aut si quis fuerit per insidiosa loca iturus.*" It will be time enough to decide that interesting and large question when the case arises. On the grounds that exist in this particular case I am of opinion that the appeal fails and must be dismissed.

PORTER, M.R.:—

The coroner's inquisition, including the finding of the jury, was admitted at the time by consent—in order to show that the death of Jane Agnew was a death by suicide. There was some suggestion (as I understood it) at the Bar that the admission went no further than this. But what is admitted is the verdict of the jury, and that verdict is "that the said Jane C. Agnew did commit suicide by taking an irritant poison while in a state of temporary insanity." It therefore stands admitted that the poor woman was of unsound mind when she poisoned herself; that is, that the intention of taking away her life which undoubtedly existed (accident being out of the case) was an insane intention.

This consideration alone would in my opinion dispose of the case: because the contemplation of death which is an essential ingredient in a *donatio mortis causa* was in this case a contempla-

(1) 4 H. L. Cas. 1. (2) 1 Sm. L. C. 387; 2 Wils. 341, 347. (3) Prec. Ch. 269.

tion of death by suicide; and it is quite impossible to suppose that the determination to take away her life was a sane determination on the 17th May, and that it was an insane determination on the 21st. Insanity is not a quality of the outward act, but of the mind of the person who commits the act. There is nothing in the case to afford a shadow of foundation for the argument addressed to us that on the 17th Jane Agnew seriously contemplated the possibility of her afterwards becoming insane and then killing herself; and any such notion is utterly contradicted by the terms of the letter which has been read. If she was insane when she took the poison, she was also insane when she decided to take it and acted on that decision by endorsing and handing over the deposit receipt to her sister. If the verdict of the jury is correct or otherwise binding—the *donatio mortis causa* was an act of insanity, and cannot be supported as conferring any rights upon the donee who is a volunteer.

But although in the case before us this consideration might suffice, yet it might be a narrow ground: since the practice of finding temporary insanity in cases of suicide is inveterate, and often unsupported by facts; and where there is no specific finding that on the 17th May the deceased was insane, it would be hard to hold that the right to the property in question should depend on whether a coroner's jury did or did not add the usual tack to their verdict. The case was argued also on the basis that the deceased on the 17th May had in sane contemplation a death by suicide, that is a felonious act; and I believe—though I have not seen them—the judgments of the Exchequer Division proceeded on that basis.

In the present case the woman's husband had got from her £62 to pay his rent and 5*s*. for railway fare to Belfast and back. She dreaded the loss of all her money, and probably knew nothing of the law which gave her the control of her own. Thinking there was no other way of placing it beyond her husband's reach, she determined to give it to her sister, and then destroy herself. This was not *donatio mortis causa*, but *mors donationis causa*. She did not give the money because she was dying, but died because she wanted to give the money.

An essential element in *donatio mortis causa* is that if the donor

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recover, the gift is at an end and the right to possess the thing given reverts to him. In the case of intentional suicide this is utterly impossible.

A *donatio mortis causa* must in any view of it depend upon the state of mind of the donor. The act is nothing—unless the intention is shown. There are many other acts *inter vivos* the legal validity of which depends upon the existence of a particular mental condition or intention, but none in which the connexion between the act and the intent is more absolutely indissoluble than in the case of a *donatio mortis causa*. Now can it be the law that an act absolutely depending on intention can be valid—when the intention consists of a design to commit felony? A *donatio mortis causa* is incomplete till death, and depends upon it. If the sick man recovers it is of no avail. No property passes until death. In the case of felonious suicide, therefore, the accrual of the right depends upon the committal of a felony; and the intent to commit that felony is a necessary constituent of the gift. In my opinion it is fundamentally opposed to the first principles of our law, or of any law which treats suicide as a crime, that legal rights should be created by the intention to commit suicide to be followed by the actual commission of it. Of course the title of a personal representative of a *felo de se* depends upon the death of the suicide. But it does not depend upon the quality of the act—or the mode of the death—or upon the intention. Since the abolition of forfeiture the property goes as if death had arisen from natural causes.

No case has occurred in which this question has arisen. Till the recent Act, forfeiture would have attached; and in any case, the number of suicides is relatively small; and attempted *donationes mortes causa* by intending suicides must be very few indeed; besides which, the advisers of the claimant in this case are perhaps the only persons who have taken their view of the law.

But though direct precedent is absent, the law affords some analogies. Actions upon policies of insurance after death by suicide have usually turned upon the express conditions and terms of the contract. This was the case in the leading authorities of *Borradaile* v. *Hunter* (1); *Clift* v. *Schwale* (2); *Dufaur* v. *Profes-*

(1) 5 M. & Gr. 639. (2) 3 C. B. 437.

sional Life Assurance Co. (1), and the like. These decisions therefore have no bearing upon the present case. But the question of public policy, apart from special conditions applicable to the event, arose in reference, not to suicide, but to death by the hand of the public executioner, after sentence for felony, in the case of the *Amicable Society* v. *Bolland* (2). That is a very remarkable case. The facts appear sufficiently in the judgment of the Lord Chancellor which I shall read:—"The circumstances of the case are shortly these: in January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed. The question under these circumstances is this: whether the assignees can recover against the Insurance Company the amount of this insurance: that is to say, whether, a party effecting with an Insurance Company, an insurance upon his own life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the Bar, in conjunction with the noble lord, now present [Lord Radnor], and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained?

(1) 25 Beav. 599. (2) Best reported in 4 Bl. (N.S.) 194; S. C., 2 Dow. & Cl. 1.

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Is it not void on the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes? namely, the interest we have in the welfare and prosperity of our connexions. Now if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we in considering this policy, give it the effect of that insertion, which if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void. Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by counsel at the Bar, in the discussion of this case, I think that this policy cannot be sustained, and that the respondents are not entitled to recover." That seems to me a stronger case than the present. Fauntleroy as counsel put it in arguing (2 Dow and Clarke, p. 17), meant to commit forgery; but did not mean to be hanged for it. Here, the very thing intended *was* a felonious death. His assignees, too, were quite free from participation in his crime, as is the claimant here; and the reason of the decision applies to any felony resulting in loss of life.

Horn v. *Anglo-Australian Assurance Company* (1) recognises this. That was the case of a claim upon a policy of life assurance, which contained no special condition applicable to suicide; the death was suicidal, but took place whilst the insured was in a state of temporary insanity. Lord Hatherley (Wood, V.-C.) though he held the plaintiff entitled to recover on the policy, did so on the express ground that the insane act was not a crime, but in reality an accident. He refers to *Fauntleroy's Case* (2), and says that its principle might apply to "the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby; but," he adds: "I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity, and there-

(1) 30 L. J. (N. S.) Ch. 510. (2) 4 Bli. (N. S.) 194; 2 Dow. & Cl. 1.

fore committing no legal offence." And further on (p. 512), he observes: "There is no principle of public policy which calls upon the Court to say that a person who commits no offence, but who is really only subject to that which is really just as much an accident as if he had fallen from the top of a house, is to forfeit his insurance on the ground of public policy."

No doubt cases upon policies are not identical with the present, but in one way they are even stronger, since in the case of an insurance the insurer has had the benefit of all the premiums paid, and keeps them without liability to refund in the absence of express contract.

The transfer sought to be effected here is so tainted, I may say saturated, with criminal illegality (if it is to be treated as the act of a sane person, responsible for her actions) that it is impossible on grounds of public policy to attach to it any validity whatever. Thus the dilemma is complete.

On the larger ground suggested during the argument, viz., that a *donatio mortis causa* is to be limited to cases of disease, and the prospect of death consequent upon it, I pronounce no opinion; nor is it necessary to do so. No doubt, the passage from Bracton (as well as that from Swinburne) which has been referred to, and which adopts the principles and indeed the language of the Institutes—states that the doctrine applies to the cases of a soldier going to battle—or a sailor embarking on a dangerous voyage, or the like: "*Et mortis causa donatio potest esse multiplex, ut si quis contemplatione, vel suspicione mortis, alicui dat: cujusmodi donationes saepe fiunt ab aegrotantibus, vel ab eis qui in aciem sunt ituri, vel per mare navigaturi, vel peregre profecturi, et in se tacitam habent conditionem, ut hujusmodi donationes revocentur: si aegrotus convaluerit, si miles ab acie redierit, si nauta a navigatione, et peregrinus a peregrinatione.*"

But Bracton, writing in the thirteenth century, though an English Judge, was also an ecclesiastic, being the Archdeacon of Barnstaple. The references to the rights of the church, and the authority of our lord the Pope (as regards testaments) which occur in the same chapter show, as is well known, that he was thoroughly imbued with the ecclesiastical and civil law; and some of the instances, two out of three, which he gives under the

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heading of *donatio mortis causa*, would not now be held to be of that character, but if good, would be supported as gifts *inter vivos*. This was stated with great force and precision by Lord Rosslyn, in *Tate* v. *Hilbert* (1). The judgment of Lord Hardwicke, in *Ward* v. *Turner* (2) shows that in reference to this question the civil law has not been bodily incorporated into our jurisprudence, but only so much of it as has been "*received and allowed*," and unless Bracton and Swinburne are to be treated as expounding not only the civil law but the law of England on this point, there is no English authority that I am aware of deciding it. *Hill* v. *Chapman* (3) is so badly reported that it cannot be relied on as an authority for any proposition whatever: and even there, it does not appear whether the *donor* was or was not in continuous ill-health and anticipation of death during the whole period covered by the matters in proof.

On the other hand, *Hedges* v. *Hedges* (4) puts the *reason* for the doctrine on a ground which is inconsistent with the idea that a person in health, contemplating his death at a future period from a cause depending on his own volition, could make a valid *donatio mortis causa*. "*Donatio mortis causa*" says the case in Finch, "is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will, but he should die before he could make it, gives with his own hands," &c. And in the passages from Justinian and Swinburne and Bracton, "*periculum*" is the word used, which could not apply to the present case, any more than the other phrase "*suspicio mortis*."

But apart from this, and without deciding it, I am of opinion that the appeal should be dismissed.

FITZ GIBBON, L.J.:—

I am of the same opinion. The case is a very painful one in this respect, that we cannot fail to see that apprehension for the safety of her property largely entered into this poor woman's mind when she met her death, and not only has she been disappointed in her intention to secure her property for her own family, but

(1) 2 Ves. 121.
(2) 1 W. & T. 1058; 2 Ves. Sen 431.
(3) 2 Bro. C. C. 612.
(4) Prec. Ch. 269.

she has involved the very people whom she desired to benefit in serious liability.

On the question whether the deceased was sane or insane when she took away her life, I should be very reluctant to let the verdict of the coroner's jury determine the case; though it was admitted in evidence by consent. I think that the appellant's counsel did not intend to bind themselves by it as a conclusion of fact, and I prefer to put the question of sanity or insanity only as matter of dilemma.

Before I come to speak of the civil law, and the English authorities which affect the case before us, I must guard myself from being supposed to limit to disease the danger in apprehension of which a valid *donatio mortis causa* may be made. I see no reason to hold that a man can make a valid donation when he is about to undergo a surgical operation, but cannot do so when he is about to peril his life at the call of duty, or in the cause of humanity. But while I think that a danger of death may found a donation, whether it arises from natural causes or is incurred in the discharge of some duty, possibly including the duty of self sacrifice, I hold that a donation cannot be supported on a danger which is so purely voluntary as to be criminal in its origin. The later authorities use language more properly applicable to physical disease or infirmity, but, in applying the civil law, I look upon Bracton *de Legibus et consuetudinibus Angliae* as an English authority, and, if I ever have to decide this question, I shall be content if I can rest my judgment on Bracton, fortified by Blackstone in his First Edition, and by Swinburne, and in these authors there is no indication of a restriction of *donationes mortis causa* to cases of death impending from disease.

In applying quotations from the Civilians, we must always remember that they divide *donationes mortis causa* into three classes, only one of which is recognised as such by our law. The Civilians include—(*a*) testamentary gifts; and (*b*) gifts taking effect immediately as gifts *inter vivos*, but conditional or defeasible, upon the death of the donor or of the donee.

But the essential distinction between these two forms of gift and that which is, in the strict sense of English law, a *donatio mortis causa*, was not left to Lord Hardwicke to discover: the Civilians

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were well aware of it; and they put the English form of gift into a special class. They expressly lay down that a *donatio mortis causa* of that class is not a gift at all until the death of the donor. A great deal of confusion seems to me to have got into the English authorities from the use of language more applicable to a gift that may be taken back, *i.e.*—a revocable gift than to a gift not perfect, *i.e.*—a gift that has not yet taken effect. In this matter the Civilians are more accurate than those Judges and text writers who have sometimes slipped into language which introduces the idea of revocability, as distinguished from futurity or imperfection.

I take the law as I find it stated in the Pandects (Just. Pand. Lib. xxxix., Sect. 1, Art. 1).

"*Mortis causa donatio est quum quis habere se mavult quam eum cui donat, magisque eum cui donat quam heredem suum.*" It will be seen that the preference and desire of the donor to keep the property for himself rather than to give it to his donee, and only to let the donee have it in preference to the legal successor, is a state of mind not only incompatible with any actual gift before death, but also with the intention of self-destruction. The same thing is said in the Institutes, just after the passage relied upon by Mr. Campbell (II. vii. 11.) Another passage in the Pandects xxxix. vi. 35, says:—"*Sed mortis causa donatio longe differt ab illa vera et absoluta donatione, quae ita proficiscitur ut nullo casu revocetur.*" It is contrasted with a gift *inter vivos*, which is rightly described as irrevocable, but the word "*revocari*" is not applied to the *donatio mortis causa*, for the passage proceeds:—"*etenim ibi qui donat illum potius quam se habere mavult, et is qui mortis causa donat, se cogitat, atque amore vitae recepisse potius quam dedisse mavult.*" That is to say, the motive of a gift *inter vivos* is that the person to whom it is given should have it and keep it, but the motive of a *donatio mortis causa* is to let it take effect only when self-interest is at an end, and the desire to retain the object through the love of life, is still stronger than the desire to give it to the donee. Could words be used more graphically inapplicable to the state of mind of a person intending to commit suicide? But the Civilian (xxxix. vi. 7), deals with a particular case which has an important bearing on the question before us:—"*Si aliquis mortis causa donaverit et poena capitis affectus, removetur donatio ut imperfecta.*" That is to say

—if anyone has given a *donatio mortis causa* and afterwards suffers capital punishment, the *donatio* never takes effect at all. The gift is not forfeited, it is imperfect. The question could not arise unless death was inflicted, but the result was the same where the gift was made before the crime, or without any contemplation of punishment:—"*quamvis ceterae donationes*" (meaning donations of the other two classes) "*sine suspicione poenae factae valeant.*" The note states the reason for this distinction:—"*Ratio est quia cum morte confirmantur illae donationes tempore mortis inspici debet, an jus donandi habuerit.*" Therefore, according to the civil law, and our law is the same, in the case of a *donatio mortis causa*, in the English sense, you must look to the capacity of the donor at the time of death to see if at that time he has power to make the gift, which though made before does not take effect till then.

This brings in the dilemma. The delivery of this deposit receipt did not take effect as a gift until the death of the donor. Part of her condition of mind was that it was not to cease to be her property till her death: if she was insane at her death, she had then no capacity to complete the gift: if she was sane, we must attribute to her the intention of giving effect to the gift by a crime. In either event the gift cannot stand. As a matter of fact, the letter written by the deceased proves conclusively to my mind that the death by her own hand and the gift were the means and the end which she contemplated at the same time, and I hold that it is against public policy to uphold a gift which is intended to take effect by means of voluntary self-destruction.

We have all disclaimed the intention of deciding anything as to the possible case of a donation made in sane apprehension of an impending attack of suicidal mania, regarded as an imminent cause of impending death, which in such a case might be treated as a natural death by disease. The facts leave no room for so regarding this case.

BARRY, L.J.:—

I concur in the judgment of the Court. I rest my decision on the broad ground that to allow a gift made by a person about to commit suicide, and intending by that felonious act to give effect

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to the gift, to be lawful as a *donatio mortis causa*, would offend against public policy.

Mr. Campbell relied very much upon the translation by Mr. Sandars of the passage in the Institutes of Justinian, "*si quid humanitus ei contigisset.*" The learned translator renders these words, "if any fatal accident befalls the donor," thus attributing (according to Mr. Campbell) the translation "fatally" to the word "*humanitus.*" It is not material to the point before us; but I do not think that that is a satisfactory *translation* of the passage. It is an attempt to translate literally an euphemistic idiom. The identical phrase (substituting *accidisset* for *contigisset*) is found in Cicero's first Philippic, chap. 4, "*si quid mihi humanitus accidisset* (*multa autem impendere videbantur praeter naturam praeterque fatum*)." The Delphin edition *expounds* "*si quid humanitus*" by the simple words "*si mors.*" The words are, in fact, merely an euphemism for "death," and would apply to any mode of death in the context in Justinian, and would so far sustain the argument on the passage. It is therefore difficult to understand why it should be rendered, "any fatal accident," especially in a passage defining or describing a *donatio mortis causa*, in which the death contemplated by the donor would, even in the time of Justinian, be rarely designated as what in ordinary English is termed a "fatal accident." "If anything should happen to me," is a mode of expression in common use with us, and is employed by Mr. Yonge in his translation of this passage in the first Philippic. There is a translation of this Philippic, published in Dublin in the year 1766, in which is found the following rendering of the words "*si quid,*" &c.:—"If I should happen to share in the lot to which humanity is subjected." Either of these versions, as well as other similar phrases, can be given for the words in Justinian with perfect propriety and aptness, with the understanding from the context that Justinian meant "death." The words of Cicero in the parenthesis have been criticised on the ground that *mors* "*praeter naturam*" and "*mors praeter fatum*" are the same, whereas he seems to treat them as different. But a commentator, quoted with approval in the Delphin edition, classifies the three modes of death. He says, in substance, that that death is "*secundum naturam et secundum fata*" which is

the result of the intrinsic principles of nature; that that death is "*praeter naturam*," though "*secundum fata*," which is produced by some external cause, as if anyone perish from conflagration, or shipwreck, or other accident; and that that death is "*praeter naturam praeterque fatum*" which is the result, not of the intrinsic principles of nature, nor of external causes combined in the necessity of some action, but which proceeds from a free human act, as if a man commits suicide, or is slain by another's crime. I have referred Mr. Campbell and Mr. Gordon to a passage in Pliny, where "*humanitus*" is used in the same manner as by Cicero and Justinian, and where to translate it "fatally" is impossible.

It is quite unnecessary for us to decide whether it is essential in order to constitute a *donatio mortis causa*, that the delivery of the subject-matter must be made by the donor in a "last illness." I am very much inclined to think that such a gift would be valid in some cases where the death contemplated was not one to be caused by sickness at all. But our decision in this case leaves that question quite open.

Solicitor for the appellant: *M'Callum.*
Solicitor for the respondent: *Galway.*

G. Y. D.

Ex. Div.
1896.
Feb. 19.

HANNA *v.* KEERS (1).

(1895. No. 5203.)

Practice—Particulars—Action of seduction—Affidavit of merits.

A defendant in an action for seduction is not entitled to call for particulars without making an affidavit of merits.

Practice in this Division stated.

Motion for particulars. Action for seduction. After issue had been joined the defendant's solicitor served the following notice on the plaintiff's solicitor :—" The plaintiff is hereby required to deliver to me as solicitor for the defendant in this action within one week full particulars as to dates and places where the alleged seduction of the plaintiff's daughter, Jane Workman, took place. The defendant denies that he ever seduced or had improper intercourse with the plaintiff's daughter, and he does not know at what times or places it is alleged that the said acts were committed; and also take notice that this request is made in order to save the costs of a motion on the subject to the Court, and further that in the event of such motion being necessary after service of this notice an application will be made that the costs thereof be borne by the plaintiff."

In reply thereto the plaintiff's solicitor wrote the following letter :—" Replying to your notice of 28th January in which you state that defendant denies the seduction of my client, I have only to say that my instructions on the point are so positive to the contrary that I must leave your client to satisfy the Court that he is entitled to the particulars demanded."

The defendant then served notice of the present motion, asking for costs against the plaintiff; the affidavit filed in support of the motion contained all necessary averments; and itwas

(1) Before the Full Court.

conceded that particulars should be given, the only question being as to the costs of the motion.

R. F. Todd, for the defendant:—

The plaintiff did not call for an affidavit of merits, and absolutely refused to give particulars unless ordered by the Court. Such particulars were now admittedly necessary, and the plaintiff ought therefore to pay the costs of the application.

William Moore, for the plaintiff:—

Until service of the affidavit grounding the present motion the defendant did not bring himself within the rule laid down in *Keenan* v. *Pringle* (1). [ANDREWS, J., referred to *Knight* v. *Engle* (2)].

THE LORD CHIEF BARON stated that it was admitted that the plaintiff could not be compelled to give particulars until the defendant made an affidavit of merits. There had been some uncertainty in practice as to the stage at which the affidavit should be made; but the Court now desired to lay it down as a rule of the Exchequer Division that in cases of the present sort the defendant must file in Court and deliver with his preliminary notice an affidavit containing the necessary averments. Should the plaintiff on receipt of such notice and affidavit refuse to deliver the particulars he must satisfy the Court on motion thereafter that such refusal was justified. In the present case, however, as costs were asked against the plaintiff, and as the practice had been so unsettled, the Court would direct that the costs of both parties should be costs in the case.

Solicitor for the plaintiff: *J. H. Bradley.*
Solicitor for the defendant: *R. C. Martin.*

J. P. B.

(1) 28 L. R. Ir. 135. (2) 61 L. T. 780.

Q. B. Div 1895.
Nov. 8, 12, 15, 18.

THE GUARDIANS OF THE MIDLETON UNION *v.* M'DONNELL (1).

Poor rate—Liability of owner of disused mill—Meaning of "occupier"—1 & 2 Vict. c. 56, ss. 71, 124.

M., the lessee of a corn mill, evicted, for non-payment of rent, her subtenants, who had been in occupation of the premises, and who had rebuilt the mill and provided new machinery for it. M. was in possession at the time when a rate was struck by the plaintiffs. M. had put a caretaker in charge, who kept the machinery in order, and the premises were advertised to be let by her as a going concern. M. had not used the premises as a mill at any time:

Held, on case stated (*diss.* Johnson, J.), that the Court was not bound to hold, as matter of law, that M. was in immediate use and occupation, so as to be liable as rateable occupier, within the meaning of 1 & 2 Vict. c. 56.

CASE STATED by the Lord Chief Justice for the opinion of the Court upon the hearing of a civil-bill appeal heard at Cork during the Summer Assizes, 1895.

The case was as follows:—

1. The civil bill in this case was brought for £42 4*s.* 2*d.*, £21 thereof being the amount of a poor rate made by the plaintiffs on the 12th August, 1893, in respect of a certain mill and premises situate in Midleton in the Poor Law Union of Midleton and county of Cork, and then in the occupation of Messrs. Hayes, and which rate is still unpaid; and plaintiffs aver that Messrs. Hayes afterwards, to wit, in or about the month of May, 1894, ceased to occupy the said premises, and the defendant then entered into and still continued in occupation of said premises, and said rate has been duly demanded from her by the plaintiffs; and £21 4*s.* 2*d.*, the balance thereof, being the amount of a poor rate made by plaintiffs in respect of the said premises on the 4th August, 1894, said premises being then and still being in the occupation of the defendant, and which rate is still unpaid.

(1) Before JOHNSON, HOLMES, and GIBSON, JJ.

2. The rated premises consist of an extensive corn mill in the town of Midleton, and the defendant admitted the due making and publication of the two poor rates mentioned in the civil bill, as therein set forth.

3. The defendant's title to the rated premises is as follows:—

4. By indenture of lease dated the 18th July, 1828, and made between Samuel M'Call of the one part, and Thomas M'Call, Joseph Leycester, and John Cotter of the other part, the said Samuel M'Call demised to the said Thomas M'Call, Joseph Leycester, and John Cotter, their executors, administrators, and assigns, ALL that and those the mill of Midleton, situate in the barony of Imokilly and county of Cork, together with two acres of land English statute measure next adjoining, together with the use of the mill-stream or mill-race which works the said mill, in as full, large, and ample a manner as the said Samuel M'Call held the same under Lord Viscount Midleton, together with all rights, &c.; and all the buildings, machinery, works, and improvements made and erected thereon TO HOLD for a term of 976 years from the 25th March, 1828, at the yearly rent of £43 3*s.* 1*d.*, British. In the said lease is contained a covenant by the lessees to preserve, uphold, support, maintain, and keep the said demised premises and every part thereof, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and at the end of the term thereby granted or other sooner determination of the demise so to leave and yield up the same unto the lessor, casualties of fire, war, and rebellion alone excepted.

5. The lessee's interest in this lease had, prior to the making of the rates sued for, become vested in the defendant.

6. By an indenture of sub-lease dated the 1st January, 1835, and made between the said Joseph Leycester and John Cotter of the one part, and Samuel Allin the younger, of the other part, the said Joseph Leycester and John Cotter demised unto said Samuel Allin, ALL that and those the mill of Midleton situate in the barony of Imokilly and county of Cork, together with two acres of land English statute measure next adjoining, together with the use of the mill-stream or mill-race which works the said mill in as full, ample, and beneficial a manner as the said Joseph Leycester and John Cotter and their late copartner in trade, Thomas

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M'Call held same, together with the rights, &c., and all the buildings, machinery, works, and improvements made and erected thereon, TO HOLD for a term of 970 years from the 25th March, 1834, at the yearly rent of £200. In said indenture is contained a covenant by the lessee to preserve, uphold, support, maintain, and keep the said demised premises and every part thereof, and the mill and machinery thereon, and all proper improvements made and to be made thereon, in good and sufficient repair and condition, and at the end or expiration of the term thereby granted or other or sooner determination thereof so to leave and yield up same to said Joseph Leycester and John Cotter or either of them, their executors, administrators, or assigns, casualties of fire, war, and rebellion, only and always excepted.

7. The lessee's interest in this lease had, prior to the making of the rates sued for, become vested in William O'Brien and Joseph Henry O'Brien.

8. For several years prior to the making of the rates sued for, the premises comprised in the two indentures above recited, were in the occupation of said William O'Brien, Joseph Henry O'Brien, and John Cave Hayes, trading in copartnership as the Midleton Flour Mills Company, as tenants to said William O'Brien and Joseph Henry O'Brien: said copartnership was dissolved on the 1st August, 1893.

9. On the 15th April, 1894, a writ of summons was issued out of the High Court of Justice in Ireland, Queen's Bench Division, by said defendant against said William O'Brien and Joseph Henry O'Brien for the recovery of possession of the premises comprised in said lease of 1st January, 1835, for non-payment of rent; and judgment was marked in said action on the 8th May, 1894, and on the 28th May, 1894, possession of said premises was taken by the sheriff of the county of Cork under a writ of *habere* in said action, dated the 8th May, 1894, and delivered to the defendant.

10. It was admitted by the defendant that the first rate sued for, viz.:—that made on the 12th August, 1893, was left unpaid by the Midleton Flour Mills Company and by Messrs. O'Brien, and is still unpaid, and had been duly demanded from defendant before action brought.

11. The mill had not been worked by the Midleton Flour Mills Company or the said William O'Brien and Joseph Henry O'Brien during any portion of the period covered by the first rate sued for, nor had it been worked by the defendant since she obtained possession. The defendant is not engaged in any trade or business, and had no intention of working the mill herself. No rent had been received by the defendant since the 25th March, 1893, and the mill had, since the date of the eviction, been wholly unprofitable to the defendant.

12. In or about the year 1888 the mill was destroyed by fire, and was shortly afterwards wholly reconstructed by the Midleton Flour Mills Company, the then tenants, as a roller-mill, and fitted with machinery as a roller-mill. The machinery in the premises at the time possession was given to the defendant as aforesaid consisted of a large steam engine and boiler erected in a building adjoining the mill, and built into and affixed to same as engines are usually built and fixed, the driving-shafts working in frames set into concrete beds in the ground floor of the mill; steel rollers for grinding wheat and Indian corn bolted into the walls and floors of the first floor; and divers machinery for purifying and finishing the flour, bolted in a similar manner into the second, third, and fourth floors of the mill, the whole being connected by divers belts and shoots for conveying the flour and grain through the different processes of manufacture, passing through apertures in the several floors from the bottom to the top of the mill—the whole forming one connected system so constructed and arranged that each and every part is necessary to the working of the mill. No part can be removed without rendering the mill unworkable unless replaced. In the reconstruction of the mill the floors and internal structure were specially made and adapted to receive the aforesaid machinery. Prior to the eviction all the utensils and furniture used by the tenants for the purposes of their trade were removed by them from the mill, nothing being left in the mill at the time of the eviction save the fixed machinery hereinbefore described. In addition to the steam power there is a water wheel connected with the mill capable of driving same when there is a sufficient head of water in the stream, and the water power was so in use down to the date when the mill ceased to be worked, the

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water power being used in the winter, and the steam power in the summer.

13. Since defendant obtained possession of the mill she has had a caretaker living near the mill to look after the mill and machinery. The caretaker has throughout kept the machinery oiled and in working order, and defendant has also had some repairs done to the roof of the engine-house and to the banks of the mill-race. The defendant also advertised the mill to be let, describing it as having been rebuilt within the last few years in the most substantial manner and at a great cost, and stating that it was fitted up with the most modern machinery, all in splendid working order.

14. Copies of the civil-bill ratings and the said two indentures of lease are to be produced on the hearing of the case, and taken as part thereof.

15. Plaintiffs contended that, on the facts stated, and in view of the fact that the aforesaid machinery was always kept in the mill, the mill was not "unoccupied" within the meaning of the 25 & 26 Vict. c. 83, s. 12, and that the mill did not become unoccupied merely because it was not worked by the defendant. The defendant contended that the mill, since the date at which she obtained possession, has become "unoccupied" within the meaning of the above Act, and that she is not an occupier liable to the payment of the rates or any part thereof.

The question for the decision of the Court is, whether under the circumstances, the defendant is liable for the amount of the said rates or any part thereof.

PETER O'BRIEN.

A. M. Sullivan (with him *D. B. Sullivan, Q.C.*), for the Guardians:—

The fact of the mill having stopped working does not negative occupation: *Staley* v. *Overseers of Castleton* (1); see also the judgment of Cockburn, C.J., in *Harter* v. *Overseers of Salford* (2). It is enough that there should be a beneficial occupation to make the premises liable to rating, and until the mill were sold or let, the

(1) 5 B. & S. 505. (2) 6 B. & S. 591

occupation would be beneficial: *Staunton* v. *Powell* (1). If the premises were unoccupied *and* unfurnished it would be different: *Corporation of Sligo* v. *Wynne* (2). The word "furniture" there must be taken *secundum subjectam materiam*. The machinery in the mill could have been removed without injury to the structure. The fact that there may have been covenants not to remove the machinery is immaterial: *Holywell Union* v. *Halkyn Drainage Company* (3). The mill was taken *cum onere*. Premises in the condition of these must be in the occupation of someone; this cannot be either the superior landlord or the evicted tenant. A new tenant would become the occupier by a contract with the defendant. "Occupation" does not depend upon title (*vide* the judgments of Lords Herschell and Macnaghten in *Holywell Union* v. *Halkyn Drainage Company* (3)); and, further, it would be impossible for the rating authorities to go into the title of every person who produces a quantity of title-deeds.

Ronan, Q.C., and *Lawrence*, for the defendant:—

The English cases must be read with the definition section of the Irish Act, the words of which are stronger than the English section. Legal possession is not use and occupation: *Guardians of North Dublin Union* v. *Scott* (4); *Guardians of Limerick Union* v. *White* (5). There is no authority as to the liability to rating arising from the presence of machinery. If there were no machinery, the building would not strictly be a mill; therefore, if the Court decides against us, mills need not have been included in the Act, as they never could become unoccupied. The oiling of the machinery is no more significant than having a caretaker, and is not evidence of occupation, being only done to prevent deterioration of the property. *Staley* v. *Overseers of Castleton* (6) can be distinguished. That was a case where an owner and occupier ceased to use the mill, by reason of a temporary difficulty, and he kept his servants there with a view to the resumption of business. There, too, the mill was treated as a storehouse for the

(1) Ir. R. 1 C. L. 182.
(2) Ir. R. 7 C. L. 465.
(3) [1895] A. C. 117.
(4) 1 Ir. C. L. R. 76.
(5) 2 Ir. C. L. R. 630.
(6) 5 B. & S. 505.

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owner's machinery, and it was found as a fact that he derived a benefit from its use as such. Here the defendant has the machinery thrown on her hands, and she must keep it there. *Staunton* v. *Powell* (1) is not an authority for the unqualified proposition that the owner of a furnished house is, merely by reason of the fact of the furniture being in it, liable for poor-rate. The machinery could not be removed: *Cosby* v. *Shaw* (2). Under her lease the defendant is bound to keep, not only the building, but the machinery, in repair. In this case the burden of proof is on the plaintiffs to show that the defendant ever was the occupier, while in all the English cases there was a person previously in occupation, and on whom the burden of disproof lay. In *Staley's Case* (3) the Judges relied on the fact that he could have removed his machinery.

Sullivan, Q.C., in reply:—

The occupation need not be at the time beneficial. It is sufficient if it afterwards becomes so.

[The following were also referred to in the course of the argument:—*King* v. *Ardilaun* (4); Amos on Fixtures, pp. 32, 35; *Guardians of the Callan Union* v. *Armstrong* (5).]

Cur. adv. vult.

Nov. 18.

GIBSON, J.:—

The point of law intended (as counsel agree) to be reserved for our decision is whether upon the facts found the defendant *must* be deemed to be in actual occupation. The question is not whether there is evidence sufficient to support the plaintiffs' action, but whether there is evidence to maintain the Recorder's decision in favour of the defendant.

As occupation is usually a question of inference from facts, it is necessary to exercise caution in dealing with decided cases, lest we should turn inferences of occupation drawn from one state of

(1) Ir. R. 1 C. L. 182.
(2) 23 L. R. I. 181.
(3) 5 B. & S. 505.
(4) [1894] 1 I. R. 48.
(5) 16 L. R. I. 33.

facts into conclusions of law to govern other states of fact, which, though in some respects similar, are not identical.

The test of occupation is immediate use and enjoyment. Authorities only assist so far as they supply principle and reasoning in reference to the application of this test. Three classes of decision have been brought to our attention. The first class relates to an empty house, or store, to let, or a vacant piece of building-ground to let, from which the owner gets no immediate benefit. Under ordinary circumstances such premises may be regarded as unoccupied: *Scott's Case* (1); *Smith's Case* (2). The second class is where a house is furnished with a view to letting furnished. Such a house may be held to be occupied by the owner when unlet, though he does not intend to reside in it. The reason of this appears to be that such a house may be more beneficially used for the entire year, though several months unlet, than a house let for the entire year unfurnished. Where a house is ready for immediate occupation it might be dangerous to allow the owner to escape liability on the mere ground that he only intended to let, when he might at any moment change that intention. This principle would hardly apply to such a mill as the present, which would be likely to be let permanently, and from which all movable utensils and apparatus had been taken away, so that a considerable outlay would probably require to be made before the mill could be set to work again. Another reason suggested in *Staunton* v. *Powell* (3) for holding the owner of a furnished house rateable is that he may be considered as using the building as a storehouse for the furniture. This is certainly not his intention, nor is the house valued on any such basis; but, if the reason is a good one, it does not necessarily extend to fixtures, the presence of which—at least of a certain class—in an ordinary house would not raise any necessary inference that such house was used as a store in respect of such fixtures. The third class of cases relied upon was that relating to mills. Of the three cases cited two, namely, *Staley's Case* (4) and *Harter's Case* (5), were heard on appeal, and the Court may have exercised some

(1) 1 Ir. C. L. R. 76.
(2) 61 L. T. (N. S.) 870.
(3) Ir. R. 1 C. L. 182.
(4) 5 B. & S. 505.
(5) 6 B. & S 591.

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liberty in drawing inferences of fact which this Court is not able to do. In *Hoyle's Case* (1) the case was stated under a statute not quite the same in its terms as 27 & 28 Vict. c. 99, s. 35, which is expressly limited to questions of law. In all these cases the mill premises were in the original trader's hands, and this is made the *ratio decidendi* by Blackburn, J., in *Harter's Case* (2). In *Staley's Case* (3) and *Harter's Case* (2), where the mill was rated as a storehouse, there were loose chattels in the mill. In *Staley's Case* (3) and *Hoyle's Case* (1) occupation was not disputed, the controversy being only as to value and benefit of occupation. In this country the rating would be upon the mill, not as a storehouse, but as a mill. For the above reasons I do not think that any of the authorities cited govern this case, where the owner of a mill with trade fixtures, put in by a tenant whom she has evicted, intends to let and not to work the mill, which remains meantime in her hands unprofitable and idle. I deal, therefore, with the case on principle.

Three points are relied upon as establishing occupation—the presence of the machinery; the employment and services of the caretaker; and the repairs. The two last matters would not be conclusive proof of occupation in the case of an ordinary empty dwelling-house; and in the case of a vacant mill, though they may be evidence, they do not certainly conclusively establish immediate use and enjoyment. The substantial point argued was as to the machinery, which was, it is said, a removable trade fixture, the continuance of which in the mill shows that the building is used and occupied.

The first point is whether the machinery could as against the landlord be lawfully removed. The decision of the learned Recorder was entirely based on the assumption that it could not be, on the authority of *Cosby* v. *Shaw* (4). His attention, however, was not directed to the limitation of the covenant here excepting casualties by fire, and to the fact that the premises and machinery had been destroyed by fire. Counsel, however, for the defendant argued that notwithstanding the fire, it was not shown that the machinery afterwards placed in the reconstructed mill

(1) [1894] 2 Q. B. 372.
(2) 6 B. & S. 591.
(3) 5 B. & S. 505. [181.
(4) 19 L. R. Ir. 307; 23 L. R. Ir.

was now removable. The argument embraced many points. It was not shown that the fire was a casualty not occasioned by negligence. Even if the mill with machinery was re-erected without any obligation on the tenant's part, the building when constructed became part of the demised premises, and with the fixtures became subject to the covenant. The sub-lease of 1834 was for the same term as the lessor's own lease of 1828; it was therefore an assignment; and though the judgment in ejectment might be an estoppel *inter partes*, it did not prevent the head landlord from disputing the defendant's right to trade fixtures erected by the defendant's assignee. Lastly, there was no authority or ground for holding that the tenant who put up the fixtures had waived his right of removal, or made a gift of them, in favour of or to his immediate landlord rather than the owner in fee.

These difficult questions I do not propose to decide. If the fixtures could not be legally removed I do not think that by abstaining from an illegal act the defendant can be said as a necessary inference to be using the mill as a storehouse or otherwise. I deal with the case on the assumption that the fixtures could have been and could be lawfully removed by the defendant as ordinary trade fixtures.

It is expressly admitted by plaintiffs' counsel that the building is not accessorial to the machinery, and that it became part of the inheritance. The machinery itself is of such character as, between heir and executor, or on conveyance or mortgage, would pass with the hereditament descended sold or mortgaged. In the case of a dwelling-house the presence of fixtures could hardly be relied on as of itself constituting occupation. Every residence has mantelpieces, grates, shelves, &c., and such fixtures form part of the premises. If a fee-simple owner would not be conclusively deemed to be in occupation merely by reason of the existence of such fixtures, it is hard to affirm that a middleman must be so deemed merely on the ground that having put them up he could remove them. Each case must be looked at as a whole, and it may be that as a matter of evidence something might turn on the nature of the fixtures. To describe however an ordinary dwelling-house as a storehouse for the fixtures in it appears to me contrary to the ordinary use of language and to common sense.

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In the case of this mill it is certain that the fixed machinery enhances the rateable value of the hereditament. It seems hard that it should at the same time conclusively prove that the mill is used as a store, which assumes a different principle of valuation. In my opinion, on the facts found, the defendant is not *proved* to be in immediate use and enjoyment of the premises. It is not enough that there is evidence: we can only decide questions of law, not of fact.

I express no opinion whether the existence of loose machinery —which also might affect rateable value: *Tyne Boiler Works Company* v. *Overseers of Longbenton* (1)—would, or would not, affect the result, or whether if the defendant had been a trader (as in *Harter's Case* (2)) that would of itself establish occupation. It may be that these circumstances would be more matter of evidence than of conclusive proof. Machinery may be a form of occupation, but the ultimate test is immediate use and enjoyment.

HOLMES, J.:—

The question reserved for our consideration by the Lord Chief Justice, as I understand it, is whether the dealings of the defendant with the mill, as set forth in the case, constitute such an occupation of it on her part as to make her liable for poor rates. Whether a person is, or is not, the occupier of premises within the meaning of the poor law code depends in some measure upon legal considerations, but it depends to a still greater extent upon inferences of fact; and it must be remembered that when a case is stated upon the hearing of a civil-bill appeal, the function of the Divisional Court is confined to answering a question of law pure and simple. Our nisi prius experience teaches us that an action in which all the facts are admitted does not necessarily resolve itself into a question of law. The result may still depend upon an inference that can only be drawn by a jury. At first sight, the case now before us might seem to be of this character. It may be said that some of the matters proved lead to the inference that the defendant was in occupation; while other facts, equally well established, are inconsistent with such a conclusion.

(1) 18 Q. B. Div. 81. (2) 6 B. & S. 591.

Under these circumstances it may be asked how can this Court decide the question of liability without overstepping the jurisdiction assigned to it. My answer is that the case must be read so as to make it consistent with the statute. The Recorder decided upon all the facts that the plaintiffs were not entitled to recover. The Chief Justice, I assume, was prepared to affirm this decision unless he was obliged by law to hold the contrary. The question reserved for us must be taken to be, not whether he was at liberty, but whether he was bound, to find for the plaintiffs; and we are dealing with it upon this basis.

It has been long well settled in both England and Ireland that the occupation that carries with it liability to poor-rates, is something different from mere legal possession. There must be, in the words of the Irish statute, the immediate use and enjoyment of the premises. The distinction, however, is better explained by illustration than by definition. In both countries it has been held that the owner of an empty house, from which the furniture and other chattels have been removed, and who does not use it for any purpose, is not an occupier; nor does he become so by his taking the usual steps to let it, or by employing a caretaker to look after it. On the other hand, the owner of a furnished house is generally held to be the occupier, even although he derives no benefit from it. In each of the cases I have put, the owner has legal possession, can maintain an action of trespass, exercises complete control, and is endeavouring to make the premises profitable. Why should he be held to be in occupation in one case and not in the other? It must be because there can be drawn from the presence of the furniture an inference of fact which would not be deducible if the house was empty. The use of furniture is not, as a rule, connected permanently with the use of any particular house. Furniture can be easily removed from one building to another, and there is no difficulty in disposing of it by sale. When, therefore, we find the owner of a house furnishing it, or when, after removing from it, he allows his furniture to remain, the natural inference is that, in some way or other, the house and furniture together are to become the subject of immediate use and enjoyment, and therefore the liability to poor-rates attaches. Still I do not gather from the judgments in *Staunton* v.

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Powell (1) that the owner of the house and furniture is necessarily in occupation. Monahan, C. J., who gave the leading judgment gives his reasons for holding in that case that there was occupation: but it is obvious that these reasons would not apply to every case, and I can conceive a state of circumstances in which some furniture of the owner left in a house would not justify the conclusion that he was in occupation.

In the case before us we are dealing with a mill which, up to the year 1894, was in the hands of the tenant, an assignee of the defendant, who then acquired the legal possession of it by means of a decree in ejectment. The mill had not been worked for some time before such possession was obtained, and the defendant never worked, nor thought of working it herself. It will thus be observed that there is an essential difference between this and the English mill cases that have been referred to. In those the person sought to be held liable was undoubtedly occupier up to a particular time, and he endeavoured to show that he ceased to occupy merely by reason that the mill was no longer worked. Here the defendant was never in occupation until the ejectment; and it is for the plaintiffs to satisfy the Court that what happened then and subsequently constituted her the occupier. Let us consider what is relied on for this purpose. Unable to obtain rent from a tenant presumably insolvent, the owner has recourse to legal process to terminate the tenancy. No doubt the decree gave her legal possession; but the same thing occurs in the case of dwelling-houses every week, and it has never been suggested that the landlord thereupon becomes liable to poor-rates. It is said she tried to let the mill. No doubt she did; but I have already pointed out that this in itself does not make her occupier. There only remains the question of machinery. In this, as in all other mills, there is a certain quantity of fixed machinery which, without having lost its character of chattel property, is so incorporated with, or attached to the fabric, as to make it impossible to remove it without more or less injury to both it and the building. This remained on the premises when possession was given to the defendant, and it is there still. There

(1) Ir. R. 1 C. L. 182.

has been a good deal of argument as to whether the defendant was entitled to take this away. To this point I attach no importance, because whether entitled to do so or not, it is the last thing he would have thought of doing; and I cannot conceive how occupation, which must be substantially a question of fact, can depend upon the existence or non-existence of a legal right which, if it had existed, would admittedly not have been exercised. In truth there is no analogy between such machinery as I have described and furniture. The fact that the owner's furniture is found in a house, derives its value as evidence of occupation from the consideration that the natural inference is that it would not be there if the owner was not using the house; but no such inference can be drawn from the non-removal of machinery which would not be removed under any circumstances. I am therefore of opinion that both the County Court Judge and the Judge of Assize were at liberty to draw from the evidence in this case the conclusion that the defendant was not in occupation. There is only one Irish case in which the liability of an idle mill to poor-rates was considered; and that does not give much help, inasmuch as, although it was held not to be liable, it does not appear from the report whether it contained any machinery. The three English cases referred to are, in my opinion, not in point. A mill temporarily idle in bad times, or during a workmen's strike—a mill worked by the owner, and only stopped to enable him to procure a tenant or purchaser, bears no resemblance to the mill in the present case. The somewhat far-fetched view of the Judges in those cases, that the mill might be regarded as a store for the machinery, was probably appropriate to the facts before them. It does not, however, apply to the facts with which we have to deal. As well might a dwelling-house be considered a store for its doors, its grates, and its partitions. It is perhaps the misfortune of Irishmen that even when dealing with serious legal subjects, they retain some sense of humour.

JOHNSON, J. :—

I have the misfortune to differ from my brethren. The Guardians of the Midleton Union made poor rates on the 12th August, 1893, and 4th August, 1894, respectively, and sued the

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respondent, Ellen M'Donnell, by civil bill for £27 of the former and £22 4*s.* 2*d.* of the latter rate in respect of a flour mill in the Midleton Union. This mill with its mill-race and appurtenances and two acres of land were demised by lease of the 18th July, 1828, for a term of 976 years from the 25th March, 1828, which is still subsisting. The lessees in that lease sub-demised by lease dated the 1st January, 1835, the mill and premises by the same description, and for the same term as in the lease of 1828, wlthout retaining any reversion. Therefore, if this sub-lease was valid, it operated in law as an assignment to the lessees in the sub-lease of 1835 of the interest of the lessees under the lease of 1828. The case, however, states that "the lessee's interest in this lease" (*i.e.* the lease of 1828) had prior to the making of the rates sued for become vested in the defendant (Mrs. M'Donnell). In *Lord Bute* v. *Grindall* (1) Buller, J., says, "It is perfectly immaterial what interest the occupier has in the lands: whether he holds as tenant at will, or by any other tenure. It is not necessary to inquire into the occupier's title."

The lease and sub-lease each contain a covenant in the same words by the lessees and their assigns, during the continuancy of the demise, to preserve and keep the demised premises, and all improvements made or to be made thereon, in good and sufficient order, and so to leave them on the determination of the term; casualties by fire, war, and rebellion, only and always excepted. Counsel on both sides in arguments of much research have addressed themselves to questions of ownership of property in, and power of removal of, the machinery described in the case, and still in the mill buildings; but, for the determination of the present question, I do not think it necessary to discuss or to decide these matters, nor are the facts sufficiently found in the case to enable me to do so. Whether removable or not, in whole or part, as trade fixtures, or by whom or when, or under what circumstances, at all events, they are at present in the mill premises; are of considerable value; are the equipment of the mill, essential to its working as a going concern, and enhance its value to the owner, or to the tenant.

(1) 1 T. R. 338.

In and previous to 1888 the demised mill and premises were in the occupation of a partnership firm of three persons, Messrs. W. and T. O'Brien and Hayes, as tenants to said W. and T. O'Brien, and trading as the Midleton Flour Mills Company. In or about the year 1888 the flour mill was "destroyed by fire," under what circumstances does not appear, and shortly afterwards was wholly reconstructed by this firm, the then tenants, as a roller mill, fitted up with the machinery elaborately decribed in the case, for grinding wheat and maize, and was worked by motive power supplied alternately by steam and water.

Mrs. M'Donnell's rent was not paid, and on the 15th April, 1894, she instituted an action in this Court against the said W. and T. O'Brien, to recover possession of the mill and premises for non-payment of rent, and obtained judgment on which a writ of execution issued to the sheriff who executed it, and on the 28th May, 1894, entered and took, and then delivered over actual possession—that is, not merely legal or constructive possession—but possession in fact to Mrs. M'Donnell of the mill and premises with the machinery described in the case. The O'Briens had, previous to their eviction, removed the utensils and furniture used by them in their trade. The case stated that Mrs. M'Donnell is not engaged in any trade or business—has no intention of working the mill herself—has received no rent since 25th March, 1893, and that, since the eviction, the mill has been wholly unprofitable to her. I do not understand the object or purpose of this last statement in the case; it is not essential to rateability that occupancy should be pecuniarily profitable.

The case further states that, since Mrs. M'Donnell obtained possession of the mill, she has had a caretaker living near it, to look after the mill and machinery; that the caretaker has throughout kept the machinery oiled and in working order; that Mrs. M'Donnell had repairs done to the roof of the engine house and to the banks of the mill-race and has advertised the mill to be let, describing it as rebuilt in the most substantial manner, at great cost, and fitted out with the most modern machinery, all in splendid working order—and as would appear from the case, with shafting, bolting, and gearing complete. Under these circumstances the question for our determination is whether Mrs. M'Donnell is liable

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for all or any part of the poor rates sued for. They have been duly demanded from her, and no question arises of their recovery being barred by lapse of time.

According to the dictionaries "to occupy" is—1, "to possess, keep, or take up" (Johnson); 2, "to take or hold possession of" (Webster): an "occupier" is one who does so, and we start with the fact that Mrs. M'Donnell having evicted her tenants in due course of law, received and took over from the sheriff (who entered according to the exigency, and in execution of, the writ of possession), the clear actual possession in fact of this mill, equipped with efficient machinery and gear, in full working order for grinding grain and manufacturing flour. This condition of things has not since varied: she is still in the same actual possession in fact, and has throughout maintained the mill premises in repair and the machinery in the same working order, waiting for a tenant to whom, when found, she will give them up.

A mill is a rateable property under the Poor Law. The poor rate is payable by the person in actual occupation of the rateable property at the time of the rate made, and on his default, by the person subsequently in occupation (1 & 2 Vict. c. 56, s. 71). "Occupier" for this purpose includes every person in the immediate use or enjoyment of the rateable property, corporeal or incorporeal (section 124); that as I understand it, is as contra-distinguished from mere legal possession or possession in law only, the immediate use and enjoyment of the rateable property which is capable of being beneficial.

Judicial decision in England early established that under the Act of Elizabeth, the landlord of a vacant house in which there was no furniture, and which was not occupied by a tenant or himself, is not liable to poor rate, though Blackburn, J., says that he "never could understand the reason of it:" *Harter* v. *Overseers of Salford* (1). In Ireland this was decided in 1850, in the *Guardians of the North Dublin Union* v. *Scott* (2), and in 1852, in the *Guardians of the Limerick Union* v. *White* (3), and is now unquestioned law. Under the Poor Law Amendment Act, 1862 (25 & 26 Vict. c. 83, s. 12), a building would be entered in the

(1) 6 B. & S. 595. (2) 1 Ir. C. L. R. 76. (3) 2 Ir. C. L. R. 630.

"occupier" column as "empty"; but neither in England or Ireland was this principle ever extended to a furnished house or building, which must be taken and understood *secundum subjectam materiam*, according to the subject-matter in each case. A furnished house is a house furnished ready for a tenant to go into and live in it; a corn and flour-mill, in perfect working order, is a mill equipped throughout with the necessary machinery and motive power ready for a tenant to go into and grind corn and manufacture flour. I doubt if there is any solid difference between the fixtures of the one and the equipment of the other.

A house is not furnished for occupation, merely by mantelpieces and shelves; but a mill is equipped for occupation when supplied throughout with suitable machinery in working order, properly geared and with motive power to work it. In England, in 1864, in *Staley* v. *The Overseers of Castleton* (1), it was decided that the occupier of a cotton mill, fitted with machinery in working order, who had ceased to work the mill in consequence of depression in the cotton trade, owing to the American Civil War, but who had kept up the machinery in working order, was rateable to the poor rate in respect of the mill, although all the expense was outgoing and no money was incoming.

In the following year the principle was carried a step further in *Harter* v. *The Overseers of Salford* (2), which appears to me to be expressly in point. There the owner of a silk mill fitted with machinery in working order, absolutely gave up business in 1863, with the intention of never again resuming it, and the mill was not afterwards worked, but was advertised by the owner for sale. It was not found, in that case, that the machinery was kept in working order, but "a man occasionally went to the mill and premises to protect the property and guard against trespass or depredation" (p. 593). It was held, that Harter was rateable for the mill, for poor rate made on the 1st April, 1864, more than a year after he had retired from business. In giving judgment, Cockburn, C.J. says, "Here the owner did not intend to resume the working of the mill as owner, but was waiting, either to let the premises or sell them, as soon as a tenant or a purchaser could

(1) 5 B. & S. 505. (2) 6 B. & S. 591.

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Johnson, J.

be found." In the present case, Mrs. M'Donnell, when she took over and entered into actual possession, in fact of the mill and premises, did not intend to carry on the milling business, but was, and still is, in fact in possession, and waiting to let the premises as soon as a tenant can be found.

The mills in those cases were valued as warehouses for the machinery; but, however, that may be, it was a matter affecting the mode of valuation, with which we are not at present concerned, and also with the question of rateability, which is the principle involved in the decision of those cases, and is the question at present before this Court.

In 1867 these two English cases and the Dublin and Limerick cases came under review before seven Judges in the Exchequer Chamber in *Staunton* v. *Powell* (1). There one Anne M'Donnell, occupied, as tenant, a house and garden in Stephen's-green, in this city when the rate was made. Then Powell purchased her landlord's interest, and when her tenancy determined, she left, and he tried to let the empty premises. In this attempt he failed, and he then furnished the house and let it for five weeks to one tenant and subsequently for two months to another. On the authority of *Staley* v. *The Overseers of Castleton* (2), he was held liable to the poor rate.

I therefore think that an owner, who evicts her tenants from the mill, and takes over the clear actual possession of them, in fact from the sheriff, and enters into them, and keeps the premises in repair and the mill machinery in working order, while looking out for a tenant, is both owner and occupier in immediate use and enjoyment of rateable property capable of being beneficial.

For these reasons I am of opinion, that the question in this case ought to be answered in the affirmative, but the judgment of the Court is, that it be answered in the negative, and Mrs. M'Donnell must have her costs of the case and argument.

Solicitors for the plaintiffs: *Maurice Healy.*
Solicitor for the defendant: *A. H. Exham.*

J. H. P.

(1) Ir. R. 1 C. L. 182. (2) 5 B. & S. 505.

MORRIS *v.* KENNEDY (1).

(1892. No. 1219.)

Appeal.
1894.
Dec. 4, 5, 11.

Landlord and tenant—Lease—Covenant by lessor to make a street within one year—Breach—Assignment of lessor's interest—Liability of assignee—Continuing breach.

Lands described as bounded by a proposed new street were demised in 1872 to a lessee whose interest became vested in the plaintiff in the year 1888. By the lease the lessor covenanted to make the new street within one year from the date thereof. The lessor died in 1878. The trustees of his will and his executor assigned his interest in the lease to the defendants. The street not having been constructed, the action was brought in 1892 by the plaintiff against the defendants for breach of the covenant to make the street within one year.

Held, by the Court of Appeal, affirming the judgment of the Queen's Bench Division (Holmes and Madden, JJ., *diss.* O'Brien, J.) that the covenant was broken once for all when the year had elapsed and long before the plaintiff's title accrued, and that therefore the plaintiff was not entitled to recover.

APPEAL by the plaintiff from the judgment of the Queen's Bench Division.

The action was brought in the year 1892 by the plaintiff (who was assignee of the lessee's interest under a lease made in 1872 for 5000 years) against the defendants (who were owners of the lessor's interest in the said lease) claiming damages for breach of a covenant contained in the lease whereby the lessor covenanted to make a new street adjoining the demised premises within one year from the date of the lease. The parcels in the lease were described as bounded on the north and east by the said new street. The material parts of the lease are fully set out in the judgment of the Lord Chancellor in the Court of Appeal. The plaintiff purchased the lessee's interest in the lease in the Landed Estates Court, and his conveyance bore date January 13, 1888. The new street was not constructed either by the lessor or his successors in title. The lessor died in 1878: the defendants held under an assignment from the trustees and executors of his will.

(1) Before WALKER, C., PORTER, M.R.[1] and FITZGIBBON and BARRY, L.JJ.

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The plaintiff in his statement of claim alleged two breaches of the covenant; (*a*), by the lessor in his lifetime, and his executors after his death; (*b*), by the defendants.

At the trial the Judge directed a verdict for the plaintiff, and damages were assessed alternatively by the jury, *i.e.* £15 for damages accrued before action brought, and £350 for damages if the covenant were never to be performed. The Judge entered judgment for £350, and stayed execution.

The Divisional Court (Holmes and Madden, JJ., O'Brien, J., *diss.*) (1) having set the judgment so entered aside, and having entered judgment for the defendants, the plaintiff brought the present appeal.

(1) The following judgments were delivered (December 2nd, 1893) in the Queen's Bench Division on motion by the defendants to enter judgment for them:—

MADDEN, J.:—

My judgment in this case has been mainly determined by the use of the word "street" as descriptive of the thing which the lessor covenanted to construct and finish within one year. Had he covenanted to construct upon his own land for the benefit of the demised land, something which required continued maintenance on the part of the covenantor, I should probably have held the obligation to continue during the term of the demise. It might even in such case be necessary to imply a covenant to maintain the thing so constructed, in order to give full effect to the lease as a whole. But such a covenant should not be needlessly implied; and this principle, sound in all cases, is not less so when the breach of covenant, if it be a continuing one, must last for a period of 5000 years.

In construing the covenant in question we are at liberty to consider the nature and situation of the subject matter of the demise. It is a parcel of ground, to be used for building, situated in the Borough of Belfast, described as bounded on one side by a street actually constructed, and to be bounded on another by a second street, not actually in existence, but to be constructed and finished by the lessor. I find that the Borough of Belfast is the subject of special legislation, and that the word "street" has in that legislation a specific meaning, namely, a roadway taken over by the local authorities, certain statutory requirements having been complied with. It is a conclusion of common sense as well as of law that the owner and lessee of building ground in Belfast had present to their minds this special legislation, when they entered into a contract for the construction of a street; and I therefore hold that what the lessor was bound to complete and finish within one year was a street within the meaning of the Belfast Improvement Acts.

If this be so, the legal result appears to be clear. Once the roadway was

The facts are more fully stated by the Lord Chancellor in his judgment in the Court of Appeal.

Carton, Q. C., and *Campbell, Q.C.* (with them, *M'Ilroy*), for the appellant:—

The whole lease must be read together in order to construe the covenant: *Doyle* v. *Hort* (1). When so read the breach of the covenant is seen to be a continuing breach: this is a demise of land bounded by a street, with a covenant to make the street by the lessor: the parcels and covenant taken together show that there was in fact a demise of a right of way with carriages and

constructed and converted into a street under the Acts, the lessor had completed his contract and was under no continuing obligation with regard to the maintenance or repairing of the street, with which, indeed, he could not lawfully interfere. The case therefore ranges within the authorities which establish that, where there is a covenant in a lease to do a specific and isolated act at a definite time, on the occurring of which the breach and the amount of damage are both completely and finally ascertainable, an assignee of the leasehold interest cannot sue in respect of a breach antecedent to the accruer of his interest, although the covenant be one in its nature capable of running with the land—as the covenant clearly is in this present case. I refer to such cases as in *Grescot* v. *Green* (1 Salk. 198); *The Churchwardens of St. Saviour's* v. *Smith* (1 Wm. Bl. 351), and the decision of the Exchequer in *Doyle* v. *Hort* (4 L. R. Ir. 455). In every case in which an assignee has been held entitled to sue in respect of a breach antecedent to his assignment, it will be found that the decision was founded on the absence of one or more of the elements which I have enumerated. Thus, in *Martyn* v. *Clue* (18 Q. B. 661) it was held that an assignee could sue upon a covenant to put the premises in repair. This was held to be a covenant continuing to the end of the term, and not a covenant to do a definite act at a particular time, Lord Campbell observing during the argument that its performance was a matter essentially connected with the enjoyment of the demised premises. The case of *Kingdon* v. *Nottle* (4 M. & S. 53) was strongly relied on by the plaintiff's counsel. There a mortgagor covenanted with his mortgagee that he was seised in fee-simple, and had good right to convey. The mortgagee died, and his devisee sued the mortgagor on the covenant, assigning as breaches that the defendant had no title, and that the premises were thereby of less value to the plaintiff than they would otherwise have been. There, undoubtedly, the covenant was broken, and the measure of damage ascertainable the moment the mortgage was executed, and yet the Court of Queen's Bench held the plaintiff entitled to sue. It is not easy

(1) 4 L. R. Ir. 455, *per* Ball, C., at p. 476.

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on foot and a covenant to make it. Such a covenant is a covenant running with the land for the breach of which an assignee of the lease can sue: *Kingdon* v. *Nottle* (1); *Jones* v. *King* (2); *Spoor* v.

to see how the covenant in that case is distinguishable from a covenant to do a particular thing once for all at a definite time: the Court, however, did so distinguish it, on the express ground that as long as the defendant had not a good title there was a continuing breach, holding that the substantial breach, according to the spirit of the covenant, was in the time of the devisee, inasmuch as he thereby lost the fruit of the covenant in not being able to dispose of the estate. In the language of Lord Ellenborough, "It is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties* as the exigency of the case may require."

This case was considered by the Court of Exchequer in England, in *Spoor* v. *Green* (L. R. 9 Exch. 99), and Kelly, C.B., appears to have considered that it, and *King* v. *Jones* (5 Taunt. 418) (also cited by the plaintiff's counsel), were decided on the principle "that it is the resulting damage and not merely the breach of covenant which gives the right of action," while Bramwell, B., rather suggests that the Court was influenced in its decision in favour of the devisee of the mortgagee in *Kingdon* v. *Nottle* (4 M. & S. 53) by the consideration that they had already decided adversely to the claim of his personal representative. It may be, as Mr. Meredith suggested, that the Court was not careful to distinguish between the several covenants for title, and that it applied to the covenant that the mortgagor was seised in fee, considerations which were properly applicable to the covenants for quiet enjoyment and further assurance. But it is unnecessary to enter into these considerations, for, rightly or wrongly, the Court expressly distinguished the particular covenant under consideration from "a covenant to do an act of solitary performance," the damages for non-performance of which are immediately ascertainable; and, if I am right in my construction of the covenant in the present case, the *ratio decidendi* in *Kingdon* v. *Nottle* (4 M. & S. 53) is against the plaintiff's contention.

HOLMES, J.:—

A lease was made in 1872 by which a piece of land within the municipal Borough of Belfast was demised for a term of five thousand years at the yearly rent of £30. The premises were described as bounded on the east by a proposed new street; and the lessor covenanted for himself and his assigns with the lessee and his assigns to construct this street within a year from the date of the lease. The plaintiff purchased the lessee's interest in the Landed Estates Court; and in 1888 obtained a conveyance thereof from the Land Judge. The street has never been made; and this action is brought against the assignees of the reversion for breach of the covenant.

(1) 1 M. & S. 355; 4 M. & S. 53. (2) 5 Taunt. 418; 4 M. & S. 188.

Green (1). *Grescot* v. *Green* (2) is distinguishable because the house was not on the ground at the demise. So, too, with *The Churchwardens of St. Saviour's* v. *Smith* (3). *Espley* v. *Wilks* (4) is

It is not denied that it has been broken, and the only question is whether the plaintiff is entitled to sue. It is argued that the answer ought to be in the negative, because (1) the covenant does not run with the land, and (2) even if it does, it was broken once for all before the leasehold interest vested in the plaintiff.

The first-mentioned point ought not to cause much difficulty. The test is whether the covenant relates to, touches, or concerns, the land demised. The proposed street was not to be made on the premises actually included in the lease; but it was to form their eastern boundary, and it would afford frontage to the houses which it was contemplated would be built by the lessee. It is settled by such cases as *Jourdain* v. *Wilson* (4 B. & A. 266); *Easterby* v. *Sampson* (6 Bing. 644); and *Abbott* v. *The Midland Great Western Railway Co.* (Ir. R. 3 C. L. 333), that a covenant in a lease may run with the land or the reversion, although the subject matter of the covenant is not a thing to be done on the leasehold premises, provided it relates to the mode of their occupation and enjoyment. I am unable to imagine a covenant more closely connected with the use which, according to the terms of the instrument, the lessee was to make of the lands than the covenant under consideration. I therefore hold without hesitation that an assignee could sue for a breach of it, provided the breach occurred after the interest under the lease had vested in him. This brings me to the second point relied on by the defendants. It depends upon a principle of law entirely different from the one that has been just considered, and no light is thrown on it by the commentaries on *Spencer's Case*.

When we speak of an assignee being entitled to the benefit or liable to the burden of a covenant that runs with the land, we refer either to an unbroken covenant or to a covenant which, although broken, is continuing in its obligation, and of which there is a continuous breach as long as it is unperformed. But there may be a covenant in a lease which touches or concerns the premises demised, and therefore runs with the interests of the lessee and of the reversioner, which, if it is broken, is broken finally and once for all.

The covenantee is thereupon entitled to bring an action; but a subsequent assignment of his interest in the land does not transfer this right to the assignee. A covenant to pay the rent reserved is broken as regards any particular gale when it is not paid at the time appointed; and the amount due cannot be recovered from or sued for by an assignee taking under a subsequent assignment. The same rule applies to every covenant to do an act not continuous in its character; and it is hardly necessary to refer to *Grescot* v. *Green* (1 Salkeld, 198), and *The Churchwardens of St. Saviour's, Southwark*

(1) L. R. 9 Ex. 99.
(2) 1 Salk. 198.
(3) 1 Wm. Bl. 351.
(4) L. R. 7 Ex. 298.

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expressly in point: it shows clearly that the plaintiff is entitled to a right of way as wide as the proposed street.

[They also cited *Easterby* v. *Sampson* (1) and *Roberts* v. *Karr* (2).]

v. *Smith* (1 Wm. Bl. 351; 3 Burr. 1271) as authorities for a proposition which ought by this time to have been finally established. There is, however, a case, strongly relied on by Mr. Campbell, that it is difficult to reconcile with it. *Kingdon* v. *Nottle* (4 M. & S. 53) was an action brought by the devisee of a grantee of lands, upon a covenant contained in the deed of mortgage, by which the grantor covenanted that he was at the time of its execution seised of a good and indefeasible estate of inheritance in fee-simple in the premises conveyed. Upon demurrer to the declaration it was argued that a devisee is considered by our law to be a mere assignee and not the real representative of the testator; and that accordingly he was not entitled to sue upon a covenant, which, as is stated in Shepherd's Touchstone, 170, "is broken" (if it is broken at all) "as soon as made." The Court held that the action lay, and some of the Judges appeared to think that in the case of a covenant running with the land, the breach would always be continuing. The same question has since arisen in two reported cases. In *Spoor* v. *Green* (L. R. 9 Ex. 99) there was a difference of opinion amongst the Judges on this very point. Chief Baron Kelly adopted the view taken in *Kingdon* v. *Nottle*; but Baron Bramwell dissented from it very emphatically, and Baron Cleasby seems to have shared his opinion. In *Doyle* v. *Hort* (4 L. R. Ir. 455, 469), the Court of Exchequer in this country appears to have come to a conclusion in direct opposition to the judgment in *Kingdon* v. *Nottle*; and, although the Court of Appeal affirmed the decision on different grounds, no disapproval was expressed of the law as stated by the Chief Baron. Under these circumstances, I am of opinion that the weight of judicial authority is against the right of an assignee of leasehold premises to bring an action for breach of a covenant for good title made with his assignor; and in any case, I am not prepared to apply the doctrine of *Kingdon* v. *Nottle* (4 M. & S. 53) to covenants other than those for title. Some of the latter, such as covenants for quiet enjoyment and for further assurance, are continuing in their nature; and I can understand a Court embarrassed by its own decision, given perhaps somewhat hastily, in what was practically the same case two years before (1 M. & S. 355), holding that this is a feature of all covenants of this class.

For these reasons, I am of opinion, that the case before us depends upon whether the covenant sued on was broken finally and once for all before the assignment of the leasehold premises to the plaintiff. The covenantor undertakes by it that he will within one year from the date of the lease at his own cost and charges, make and construct and completely finish the street referred to. It would be difficult to suggest how finality could be more exhaustively ex-

(1) 6 Bing. 644. (2) 1 Taunt. 495.

Gordon, Q.C., and *Meredith, Q.C.* (with them, *R. F. Harrison*), for the respondents:—

The covenant is quite clear and distinct: it is not to be compressed than by the three verbs, and the adverb, that occur in the portion of the covenant I have read. Then consider the limit of time. Even if this were absent, it would occur to me that the language would imply that upon the expiration of a reasonable time the rights and liabilities of the parties were to be ascertained once for all; but the fixing of the definite period of a year strengthens the argument for this construction. What is there to suggest that if the lessor had, in the words of the covenant, made, constructed, and completely finished the street within the time mentioned, he would have been under any further obligation? or if he failed to do so, is there anything to prevent the covenantee from recovering damages on the basis that the leasehold premises were to lose entirely the advantages of the proposed street? Mr. Campbell has argued that the expression of one covenant may in some cases imply another. I grant it. A covenant to keep premises in repair cannot be performed unless they are first put in repair; and accordingly it has been held to include a covenant to that effect. So too, if, as in *Easterby* v. *Sampson* reference is made in the rentals to a lease of certain houses, and there is a covenant by the lessee to repair them, there may be implied a covenant to erect them if it turns out that they had not been built when the lease was made—otherwise the expressed covenant would have no meaning. But there is no analogy between these cases and the present. To build a house, or to construct a street, is a wholly different thing from subsequently repairing the one or maintaining the other. An obligation to do the first does not carry with it an implied obligation to do the second. Mr. Campbell asks us to consider all the terms of the lease and to construe the covenant sued on by the light thus thrown upon it. I comply willingly. I see that it was intended that the land should be used to build upon. I see that it is bounded on the east by a proposed street; and I see that the lessor covenants that he will construct this street. Mr. Campbell says, that this amounts to an undertaking by the lessor that the demised premises are to have for the term of five thousand years a street for their eastern boundary. It seems to me to amount to nothing of the kind. It amounts to what is said in the clearest and most definite language—that the lessor will within a year make, construct, and completely finish a street, and it amounts to nothing more; this case is, in my opinion, ruled by *Grescot* v. *Green* and *The Churchwardens of St. Saviour's, Southwark* v. *Smith*, to which I have already referred. In the former of these cases, a lessee covenanted to build and finish a house within a certain time. In the latter, a lessee covenanted to pull down the houses that stood on the east front of the premises, and to build new houses thereon within seven years. In both cases the defendant took an assignment of the premises after the covenant was broken, and he was held not to be bound by it because it was broken before

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trolled by the other parts of the deed: *Dawes* v. *Tredwell* (1): it was broken before the assignment: therefore the defendants are not liable: *Grescot* v. *Green* (2); *The Churchwardens of St. Saviour's*

the assignment. No doubt in those cases, the assignee was sought to be charged with the burden of the covenant; but if it had been the lessor who had covenanted to build the houses, the same principle would have prevented the assignee of the lessee from suing for its breach.

The present case is, I think, stronger for the defendants. I asked during the argument what is meant in the covenant by a "street"? Would the lessor have fulfilled his obligation by making a roadway of the prescribed dimensions on the proposed site, and allowing the lessee and his sub-tenants to use it? If this is what was intended, it would have been at least possible for the lessor and his assigns, as long as the ownership of the roadway and of the reversion was vested in the same person, to have preserved and maintained the so-called street, although even then I should have held that the covenant could not have been extended by implication. But this is not the true construction. The object was not to supply a means of access to the leasehold premises. It was to provide a street in the sense in which the word is understood in large towns and their suburbs, involving the idea of dedication to the public, and of being placed under the management of the highway authority and having the benefit of the lighting, the cleansing, the sewer system, and the other advantages which streets, situated within municipal limits, usually enjoy. But such a street would, immediately upon its completion, pass from the control of the lessor. He would have no more power to interfere with it than any other member of the public; and it is inconceivable that he would have incurred an obligation in regard to it extending over a period of 5000 years. It is, I think, certain that such an obligation ought not to be created by implication.

I can hardly regard as serious Mr. Carton's suggestion that the difficulty of calculating prospective damages for a breach of a covenant of this kind is an argument in favour of the obligation being of a continuing character. He forgets that in questions of damages the law assumes, and necessarily assumes, that a jury is gifted with "foreknowledge absolute." It is difficult enough to assess compensation for bodily pain, wounded affections, or blighted hopes. But this difficulty is insignificant compared with that of estimating in money the effect on a man's future life of a nervous shock, or the risk he runs from the erection of a reservoir in the neighbourhood of his residence. Yet the former is done daily in a conflict of medical testimony, and the latter was once done amid a chorus of rival engineers. Even at the trial of this action, the jury achieved what Mr. Carton would have us believe to be impossible. It often happens that damages cannot be calculated with mathematical accuracy, but the rough estimate of a jury is generally found satisfactory; and there are

(1) 18 Ch. D. 354. (2) 1 Salk. 198.

v. *Smith* (1) : *Coward* v. *Gregory* (2). To read this covenant as a continuing covenant is to strike the words "within one year" out of it: when the year had elapsed the covenant was broken once

few litigants who would not accept it in preference to the long torture of successive actions. I am of opinion that the defendants are entitled to judgment.

O'BRIEN, J. :—

In the year 1872 a person named Kennedy demised for five thousand years a plot of land, which is stated to be within the limits of the Borough of Belfast, on which two houses were to be erected within three years fronting to a street, closed at one end, called Rosetta-avenue, then in existence, and the lessor covenanted to make a new street of a certain width, which was to be the eastern boundary of the land demised. The description in the parcels was of land of accurate measurement to be bounded on one side by a proposed new street, and in the boundaries the said new street was stated to be the boundary on the east. The covenant was to make the street within one year from the date of the lease. The interest of the lessee was sold in the Landed Estates Court in the year 1888, and was purchased by the plaintiff, and the conveyance was made expressly subject to the Belfast local Acts. No street having been made within the time mentioned, an action has now been brought by the purchaser for breach of the covenant. For the defendants it is contended that the breach of the covenant was complete before the sale, and that the right of action, if any, was vested in the then owner, and could not pass to the purchaser in the Landed Estates Court. On the other hand, it is contended that there is a continuing breach for which an action can be maintained. At the trial before Mr. Justice Johnson, the damages were assessed in two alternatives—upon the assumption that the plaintiff could only recover the damage accruing up to the time of action, which were measured at £15, and also on the view that he was entitled to recover the whole damages, present and prospective, from the road not being made, at once and out and out, which were assessed at £350; and the question is whether he is entitled to one or either. Now, I think it must be assumed, on the construction of the covenant, as the case is in fact, from the nature of the thing to be done and the relation of the parties, that the land on which the new street was to be made was the land of the defendants, or the person whom they represent. And I think it must also be taken that the new street was not to be a mere right of way, either public or private, but, while necessarily carrying in it the idea of an absolute dedication to the public, it was at the same time to be a street in the ordinary sense, something having the usual uses of a street, as a means of ingress and egress from houses, and in its physical features adapted to the purpose of a boundary. Taking the covenant with the other terms of the lease, it seems to me to follow necessarily that this was

(1) 1 Wm. Bl. 351. (2) L. R. 2 C. P. 153.

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for all. *Espley* v. *Wilks* (1) is distinguishable: see pp. 303 and 304 of the report.

This is not a covenant to maintain a street. No such known and intended to be a lease of building ground. The defendants are still in the possession of the adjoining land, and there is no question as to the position of a purchaser from them without notice, if indeed a case of no notice could have been made. The test of the plaintiff's right was assumed in the argument to be, not merely whether this was a covenant that ran with the land, so as to pass to an assignee, but whether before the assignment it was finally and completely broken, in which case it was taken to be the result that the right of action then wholly vested in and belonged to the plaintiff's predecessor. For it was not doubted that, if the time for the performance of the covenant, whether one year, or a reasonable time, had not gone, the plaintiff, though an assignee, could have maintained the action. It must, I should say, be fairly considered to be the intention of the parties that a public street was to be opened, but that there is no provision, either express or resulting from legal principles, as to its maintenance after it was opened. If it were the case of an absolute dedication to the public, unless accepted by public authority, it must take care of itself. Whether the covenant runs with the land, has been treated sometimes in the argument, and sometimes not treated, as identical with the question whether there is a continuing breach.

But it has been questioned whether, although the covenant be such as would run with the land, it was not still competent for the lessee to recover the whole extent of the damage immediately, on account of the breach happening either within 12 months, when the street was to be made, or within a reasonable time, so as to debar an assignee from recovering again. And therefore the question would appear to be whether all the damage could have been recovered in the first instance. For I take it as certain that, even if the damages had been assessed in fact, once and for ever, on that assumption, that could not conclude the right of the assignee, if there were in law no right so to assess them. The present case differs from those in which such a question usually arises, because in fact no action has been brought at all by any other person, and it is the right of the former owner that is insisted upon by the defendants. The right to the damages is alleged to be a property in him, which was detached from the land, and the value of which would affect the price to a purchaser. But if the former owner was not entitled to the whole damage, the right to the benefit of the covenant must be assumed to have entered into the price, so that that casts us back to the original question whether the right remained. Of course, in natural justice the owner of any property for the time being is entitled to the benefit of all the stipulations concerning it. But that argument applies equally to every kind of covenant running with the land

(1) L. R. 7 Ex. 298.

covenant will be implied: *Erskine* v. *Adeane* (1). Even if the deed is to be read as a grant of a right of way such as the plaintiff contends for, there would be no obligation on the de-

which admits of a continuing breach, and whether there is a continuing breach must depend upon the object and nature of the covenant. Now I think it is impossible to say that this was not a covenant which ran with the land; and I find it difficult to reconcile its nature with any other idea than that of a continuing breach. The lease was a building lease. The houses to be built were to have an access to them. The whole value of the land depended upon that. The street was to be the boundary on the east, the existence of which must always attend the title to the land, and might, perhaps, be even the measure of the land demised. Without a trespass the plaintiff could not otherwise use the land in the way in which it was manifestly intended to be used. The houses which the lessee covenanted to build were to be upon Rosetta-avenue, and did not want a new street, which was therefore necessarily to be for other houses to be built. In the ordinary course, the making of a new street precedes the building of houses; and while the time in the lease for the building of the new houses was to be three years, the time for the making of the new street was one year, which would appear to me to determine the real nature of the covenant—that it was a provision for the lessee's convenience which he was to avail of at his option, and not to fix on him an absolute right and measure of his loss when the year elapsed. What was it the lessor was to do? He was to lay out a street upon land in his own possession, which street was for ever to remain and be the landmark of the lease. Without that the whole foundation of the contract for a building lease failed. I do not enter into the question whether any obligation lay upon him to do anything after the street was once made. But at all events he was to set apart and assign so much of his land as was necessary for that purpose, which is the thing the defendants want not to do upon the novel ground, not that their own situation is changed, but that the damages, though never recovered, belong to another person—the executor of the first lessee. Suppose the lessor had made the street and afterwards closed it, could it be said he had a right to do that? If not, that shows the continuance of the street is essentially involved in the covenant. The object of the covenant—as something in the use and designation of the land itself—is so different from those on which questions have arisen, that the cases do not furnish more than distant analogies for the argument. The reasoning, however, of Lord Ellenborough in the case of *Kingdon* v. *Nottle* (1 M. & S. 53), which was a case for breach of covenant for title of lands, and comes nearest the present one on the principles discussed, and the situation of the parties, tends, in my opinion, strongly to support the right of the plaintiff. But I consider the matter is capable of being decided upon reason and principle and the real intention of the parties. The defendant

(1) L. R. 8 Ch. App. at p. 763.

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fendant to maintain the right of way in repair: Gale on Easements, page 86, note (*a*).

Cur. adv. vult.

WALKER, C. :—

This is an action by the assignee of a lessee against the assignee of a lessor upon a covenant in a lease entered into by the lessor. By a lease dated the 14th March, 1872, James Kennedy demised to James Guiler, a builder, ground situated in the borough of Belfast, described as "All that and those that piece of land and premises on the south side of a new street 50 feet wide, to be called —— street, containing in front to said street 145 feet or thereabouts, on the west side 360 feet or thereabouts, and on the south side 251 feet or thereabouts, and on the east side 441 feet 9 inches, or thereabouts, bounded on the north by the said new street 50 feet wide, on the west by the portion of the lands of Ballynafeigh in the possession of Mrs. Jane Calwell or her undertenants, and on the south partly by the portion of the said lands of Ballynafeigh in the possession of the said Jane Calwell, and partly by lands the property of the said James Kennedy, and on the east by a proposed new street to be 40 feet wide, with the rights, &c.," described on the map, To Hold for the term of 5000 years at the yearly rent of £30. The lease contained a covenant by Guiler that he would within three years erect and build, and completely finish on the lands two houses, each of the clear letting value of £18, and that he would not erect on the lands any house of a less value. The lease also provided for the giving of a certi-

may not have intended to engage his property to the performance of a covenant that was to last for the whole period of the lease. That, however, is the case of every lessor who enters into a covenant that passes with the reversion. He certainly did intend and know that there was so much of his land to be taken as would suffice for a street and that was always to remain; and that was the real point of the complaint. From the view I take, founded on the nature of the covenant, as a thing attached to the constitution itself of the estate created by the lease, it follows, though logic and convenience are perhaps alike opposed to vesting parcels of the same right in a succession of persons *ad infinitum*, that the plaintiff can only recover for the damage happening in his own time, and that I am of opinion the verdict ought to be entered for the smaller amount in the alternative assessment of damages.

A. E. R. J.

ficate by the lessor as to the finishing of the two houses, and that the covenant should be deemed to have been satisfied unless the lessor should commence proceedings to recover damages for breach of the covenant to build the two houses within six months from the 14th March, 1875. The lease also contained a covenant by Kennedy, his heirs, executors, administrators, and assigns, with James Guiler, his executors, administrators, and assigns, "that he the said James Kennedy, his executors, administrators, or assigns, shall and will within one year from the date of these presents, at his own costs and charges, make or construct and completely finish, and with a footway along the eastern and western boundaries of the said lands and premises hereby demised, the aforesaid street to be 40 feet wide, and which forms the eastern boundary of the lands and premises hereby demised." There was also a proviso that no covenants other than the covenants thereinbefore expressly contained, should be implied, or be held to be implied, on the part of the said James Kennedy, his heirs, executors, administrators, or assigns. The map on the lease showed the site of the proposed new street covenanted to be constructed. There is a frontage on that side of 441 feet 9 inches.

The lessee built the two houses but James Kennedy did not construct or finish this new street, or apparently take any step towards doing so within the twelve months, or up to his death. He died on the 12th September, 1878. The defendants hold under an assignment from the trustees and executors of his will, dated the 3rd November, 1890. The plaintiff is assignee of the lessee's interest under a conveyance from the Landed Estates Court, dated the 13th January, 1888. The map on this deed shows that the street was not constructed completely.

The present action was brought on the 5th February, 1892, for breach of the covenant to make the street, and the breaches alleged in the claim are—(1) That James Kennedy did not during his life within one year, nor did his executors after his death, make or finish the street; (2) a breach by defendants of same covenant. The case was tried before Mr. Justice Johnson and a special jury at Belfast. He directed a verdict for the plaintiff, and the jury assessed damages in the alternative—(1) to the 5th February, 1892, £15; (2) assuming the covenant

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to make the street would never be performed, £350. The learned Judge entered judgment for this latter sum, staying execution, to enable the defendants to move the Divisional Court.

The case was argued before Mr. Justice O'Brien, Mr. Justice Holmes, and Mr. Justice Madden. The last two were of opinion that the breach of the covenant was complete before the assignment to plaintiff, and that no right of action was vested in the plaintiff, and consequently that judgment should be entered for the defendants. Mr. Justice O'Brien was of opinion that the plaintiff was entitled to judgment for £15.

The appellant, by his motion, only claims judgment for this smaller sum. It was admitted by the appellant's counsel that if the covenant sued on were an independent covenant to make this street within twelve months, the breach would have been complete at the expiration of that time, and that the assignee, under a subsequent title, could not claim damages for breach of the same covenant; but they contended that the lease should be construed as a whole, and that the grant showed the lessee was to have for the whole term an eastern boundary of a street which the lessor could not interfere with, and was bound to admit the existence of, consequently that the covenant was explained by the grant, and should be read (in order to give effect to the entire lease) as a covenant running with the land during the whole term, of which every assignee could take advantage and recover the damages which accrued in his own time. As a corollary of this, they contended that James Guiler could not at any time have recovered in damages the full amount of the depreciation of the premises by reason of the street not having been constructed within the twelve months, but only such damages as accrued before the assignment. But it seems to me that this argument strikes out of the covenant the definite period for its performance which is fixed by it—the period of twelve months.

I think the parties had in view a street which would be taken up by the Corporation of Belfast, but the lessor did not covenant that they would take it up, but that he would completely form a street, which it lay with the Corporation to take up. The lessor was not bound to maintain it, but I think, and at all events, I assume, that when such street was

taken over, he would be restrained under the form of the grant from interfering with the character of the street, and I further assume, though it has not been formed, that he could be restrained from ploughing up, or building on, the site of the proposed street, and also that the lessee has a right of way over its soil, but the covenant which, *qua* personal obligation, bound the lessor, fixed a time of twelve months for the completion, and when that was past, the property became one diminished in value to the extent of the absence of the street, subject no doubt to circumstances which a jury might take into account by way of diminishing damages, and complete damages could I think be recovered—in other words, Guiler might have recovered the £350.

No case was cited in which a covenant was held a continuing covenant when it stipulated for the complete performance of a defined act, within a named period.

We were pressed with the cases of *Kingdon* v. *Nottle* (1), and *King* v. *Jones* (2); whatever doubt there may be—if there is doubt about the original propriety of those decisions on covenants for good title and further assurance—I think that they must be taken as settled law, and that accordingly such covenants run with the land continuously.

Lord Ellenborough, in order to support the construction of the covenant in *Kingdon* v. *Nottle* (1) which would make a breach of it continuing, distinguished it from a covenant to do one definite act not performed, an exception which seems to me aptly to describe such a case as the present. On the other hand, in the two cases of *Grescot* v. *Green* (3) and *Churchwardens of St. Saviour's* v. *Smith* (4) the title of the assignee to sue, or his liability to be sued, in cases apparently undistinguishable from the present, was expressly negatived, and to these may be added the authority of the decision of the Court of Exchequer in *Doyle* v. *Hort* (5).

Mr. Justice Madden in his judgment in the Court below, states fully the facts and grounds of the decisions in those cases.

(1) 4 M. & S. 53.
(2) 5 Taunt. 418.
(3) 1 Salk. 198.
(4) 1 Wm. Bl. 351.
(5) 4 L. R. Ir. 455.

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Upon the argument before us, another case has been referred to which also seems a precise authority in the defendants' favour. I allude to *Coward* v. *Gregory* (1). In *Coward* v. *Gregory* (1), the material facts were: By a lease made in 1851, Richard Hall demised to Thomas Gorton certain print-works and buildings. There was a covenant by Gorton, to keep the premises (excepting the matters mentioned in Richard Hall's covenant) in repair: and Richard Hall covenanted—1, that he would forthwith put the whole of the premises into good and tenantable repair, and 2, during the whole of the term, keep the whole of the main walls, roofs, slates, and principal timbers of the buildings and the steam engines, boilers, water wheels, and first motion therefrom in good and tenantable repair, and also, 3, that he would once in every four years paint the window frames and outside woodwork. The plaintiffs were assignees of Gorton, who had become bankrupt, and brought an action, alleging in their pleadings, that the reversion vested in John Hall, and charging breaches by him after reversion vested in him as assignee. The defendant pleaded several pleas, of which two are material; viz. the fifth plea to first breach:—that in the lifetime of Richard Hall, and before John Hall became assignee, a reasonable time had elapsed to have the covenant to put the premises into good and tenantable order performed by Richard Hall, and that the covenant was wholly broken before John Hall became assignee. The sixth plea raised the same question in this form. It repeated the allegations contained in the fifth plea, and further alleged that after the death of the lessor the lessee sued the executors of the lessor, for amongst other things the same breach of covenant, that is, for not putting the premises in repair, and also for not keeping the excepted portion in repair, and recovered damages for both. It was argued for the plaintiffs that the breach was continuing so long as the premises remained unrepaired, and that for this the assignee was responsible. It was replied for defendant that the first question was whether the covenant by the lessor forthwith to put the premises in repair having been once broken, there could be any further breach of it. It could hardly be contended that the covenant being

(1) L. R. 2 C. P. 153.

once performed, the lessor could be called on to perform it again. Erle, C.J., said:—"As to the first breach it appears to me, that that part of the covenant could only be broken once, and that when damages were once recovered in respect of that breach no more could be recovered, and therefore as it is clear that the covenant to put the premises into repair was broken in the time of the lessor, and that that was a breach for which an assignee could not be liable, I am of opinion that our judgment ought to be for the defendant on the demurrers to the fifth and sixth pleas; as to the eighth and ninth pleas to the second breach for not keeping in repair, that is clearly a continuing breach, as to which those pleas afford no answer." And Willes, J., said:—"As to the fifth and sixth pleas to the first breach in the first count for not putting the premises in repair, each of these pleas alleges that a reasonable time for putting the premises in repair elapsed in the time of Richard Hall. That part of the covenant could only be broken once for all, and consequently there could be no breach of it in the time of the assignee."

This case is a clear authority on the construction of a covenant to put in repair. Suppose there the covenant had been to put in repair within twelve months, would not the case have been stronger for defendants to show that the breach was complete?

It seems to me therefore that there are in the defendants' favour four decisions, two old and two modern, upon the very point.

The judgment of Mr. Justice O'Brien in the Court below assumes that if the right of action had been complete and had vested in Guiler, it would not have passed to the purchaser by the Landed Estates Court deed, and therefore he treats the question as one whether all the damage could have been recovered by Guiler between 1873 and 1888. He then adopts the argument for the plaintiff upon this appeal and says that the continuance of the street was an object of the lease, and was therefore essentially involved in the covenant; but it seems to me that this conclusion is rather based on what might have been expected to be found in the covenant, having regard to the scope of the lease and grant, than on the terms of the covenant itself. The fact that there may be continuing damage arising from one complete breach

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does not make the cause of action out of which the damage flows a continuing cause of action. The lease by its terms negatives the implication of any covenant other than the express one. The covenant sued on is clear. It is a stipulation for the performance within a fixed date of a definite act, and it was completely broken long before the plaintiff's title accrued. Under these circumstances I am of opinion that the decision of the majority of the Judges in the Court below should be affirmed and the appeal dismissed with costs.

PORTER, M.R. :—

I am of the same opinion.

There is no case in which a covenant to perform a definite act by a specified day has been held to be a continuing covenant—capable of being broken from time to time, after the time named has elapsed. It is broken, if at all, once and for ever on the day following the day named.

The present is no doubt a covenant running with the land; and had the interest in the lease been assigned within the year, the assignee could at the end of the year have sued for the breach, and recovered the whole damage. But the breach does not run with the land; and even if it had been assigned as a *chose in action*, the Statute of Limitations would be a bar to any suit founded on it.

I was at first much impressed with the terms of the lease and the nature and purpose of the letting. I have no doubt it was a building lease in a sense larger than would be indicated merely by the covenant to build two houses. The eastern frontage along a proposed new street (440 feet) speaks for itself. And no doubt the making of the street would add immensely to the value of the holding. But there is no covenant to maintain the street when made; the true reason being that it was expected and assumed that the Corporation of Belfast would take it into their control as a public street when made, so that a covenant by the lessor to do so would be out of place. Thus the whole mischief was caused once and for all by the lessor's breach of his plain distinct covenant to make it within a year; and effect can be given—apart from

the covenant which is gone—to the intention of the parties, by holding, as is indeed admitted, that the space of 40 feet being the boundary where the proposed street should have been, must be preserved as a right of way for such traffic as a street would have subserved (*i.e.* on foot, and with horses, vehicles, &c.): *Espley* v. *Wilkes* (1); *Roberts* v. *Karr* (2).

In the case relied on mainly by the appellants, *Kingdon* v. *Nottle* (3), where the covenant was for title, the Court rightly or wrongly held that there was a continuing breach; and Lord Ellenborough says, p. 57, "So long as the defendant has not a good title, there is a continuing breach: and it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require." One would suppose this language was applicable to a covenant for further assurance rather than to one for title; but in any case, the covenant is contrasted with one such as we have to do with. *King* v. *Jones* (4) was the case of a covenant for further assurance. And in *Martin* v. *Clue* (5), where there was both a covenant to put in repair and one to keep in repair, the latter was plainly continuing. In these cases no time was named, nor could there be, for performance of the covenant held to be continuing. On the other hand, *Grescot* v. *Green* (6) is a decisive authority that when a day is named, the covenant is broken once for all, and the assignee cannot sue for a breach before the assignment to him. The entire report is very short, and I shall read it: "Lessee covenanted for him and his assigns to rebuild and finish a house within such a time, and after the time expired the lessee assigned over the premises, the house not being built and finished according to the covenant, *et per* Holt, C. J.:—This covenant shall not bind the assignee, because it was broke before the assignment; *aliter* if broke after, as if lessee had assigned before the time expired."

To the same effect was *Spoor* v. *Green* (7) and many other

(1) L. R. 7 Ex. 298.
(2) 1 Taunt. 495.
(3) 4 M. & S. 53.
(4) 5 Taunt. 418.
(5) 18 Q. B. 661.
(6) 1 Salk. 198.
(7) L. R. 9 Ex. 99.

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cases. The law is most clearly and correctly stated in *Coward* v. *Gregory* (2), in the passages, which I need not repeat, already read by the Lord Chancellor from the judgments of Erle, C.J., and Willes, J.

FITZ GIBBON, and BARRY, L.JJ., concurred.

Solicitors for the appellant: *H. & W. Mahaffy.*
Solicitors for the defendants: *Cunningham & Dickie.*

G. Y. D.

(1) L. R. 2 C. P. 153.

COCKLE *v.* TREACY (1).
(1895. No. 199.)
INGHAM AND FALLON *v.* TREACY (1).
(1895. No. 76.)

Appeal.
1895.
March 13.
July 2.

Motion for final judgment on specially indorsed writ—Gen. Ord. XIV., Rule 1 *—Judgment against executor—Assets* quando *—Form of order—Costs—Appeal "for costs only"—Judicature Act (Ireland)*, 1877, *sect.* 52.

Where an executor successfully raises the defence of *plene administravit* on a motion for judgment, he is, apart from misconduct, entitled to costs of the motion and action against the plaintiff; but the plaintiff is entitled to judgment against assets *quando* for his debt, with the costs of action and motion, also against assets *quando*.

Millar & Co. v. *Keane* (24 L. R. Ir. 49) approved and followed.

An appeal lies from an order refusing a party his costs, where the costs have been withheld, not on the ground of the conduct of the party, but by reason of the application of a supposed rule of law.

APPEALS from two orders made by the Exchequer Division in these actions and dated respectively, February 13 and 21, 1895, whereby the Court ordered that the plaintiffs be at liberty to enter judgment assets *quando* against the defendant as executor of the deceased Michael Treacy for debt and costs, such debt and costs to be only levied off the estate of the deceased which might thereafter come to the hands of the defendant to be administered.

The two appeals raised precisely the same point and were heard together.

Cockle and Ingham were creditors of the deceased Michael Treacy. Each brought his action against the defendant William Treacy as executor of Michael Treacy for the amount of their respective debts. These actions were instituted by specially indorsed writs. The defendant entered an appearance in each action, and each plaintiff moved for final judgment. The defendant resisted both motions. His affidavit showed that he himself was a creditor of the deceased for £427 2*s.*, that this debt was partly secured, that the entire assets

(1) Before WALKER, C., PORTER, M.R., and BARRY, L.J.

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that came to his hands amounted to £80 8*s.* 1*d.*, that he had paid the entire of this away to creditors of the deceased, and in addition had disbursed moneys of his own in paying the funeral and testamentary expenses, £17 7*s.* 1*d.* and £11 9*s.* 4*d.* respectively, and also in paying some creditors on account of their debts due by the deceased the sum of £22 10*s.* It appeared from the affidavit that the defendant had fully administered the estate of the deceased to the extent to which assets had reached his hands: but it also appeared that there were some outstanding assets. The Exchequer Division made the same order in each case, viz., that the plaintiff should be at liberty to sign judgment of assets *quando acciderint in futuro* against the said defendant William Treacy, as executor of Michael Treacy deceased, for the amount of the debt with costs of suit and £4 4*s.* costs of motion, said debt and costs to be only levied off the estate and effects of Michael Treacy deceased, which might thereafter come to the hands of William Treacy to be administered. The defendant in each case asked for his costs against the plaintiff, but the Exchequer Division refused to give him judgment for them.

From these orders the defendant appealed on the ground that the costs ought to have been given to him as executor of the defendant as against the plaintiff.

Littledale, for the plaintiff Cockle, and *Eustace Johnson* for the plaintiffs Ingham and Fallon :—

There is a preliminary objection to these appeals: they are brought for costs only: section 52 of the Judicature Act, Ireland, 1877.

[WALKER, C. We will allow the appeals to be argued, reserving our decision on the question raised by the preliminary objection.]

F. Fleming, for the appellant :—

Judgment should have been entered in the form settled by *Millar* v. *Keane* (1). This case has been followed in England: *Worsley* v. *Thompson* (2). If an executor, sued for a debt of the deceased, establish a plea of *plene administravit*, even though he has

(1) 24 L. R. Ir. 49. (2) See Ann. Pr. Order XIV., R. 1.

pleaded other pleas on which he fails, he is entitled to his costs: *Iggulden* v. *Terson* (1); *Edwards* v. *Bethel* (2); *Ragg* v. *Wells* (3). Here a summary application for judgment is made against the defendant: his affidavit shows that he has an absolute answer to the judgment asked for: the plaintiffs then changed their applications and asked for judgment assets *quando*. The defendant is entitled to the costs of resisting the groundless claim: the plaintiffs tried to take a statutory short cut and failed; they should pay the costs of the defendant in such a proceeding. The Exchequer Division did not refuse his costs to the defendant in the exercise of a discretion based on his conduct; they stated that they would follow the form of order settled in *Findlater* v. *Tuohy* (4); they held the rule of law to be that where judgment assets *quando* is given against an executor, he is not entitled to costs. It is a question of principle.

Littledale, for Cockle; *Johnson*, for Ingham and Fallon:—

These were discretionary orders made by the Court in the exercise of its discretion: the Court was not wholly satisfied with the defendant's affidavit: it is within the discretion of the Court to refuse the executor his costs, though they grant a judgment of assets *quando*: *Findlater* v. *Tuohy* (4).

Cur. adv. vult.

July 2.

WALKER, C.:—

Each of these cases came before us on appeal from the decision of the Exchequer Division.

Cockle v. *Treacy* is an action for £18 13*s.* brought by a creditor of Michael Treacy deceased against the defendant William Treacy as executor of the deceased. The writ was specially endorsed. The defendant entered an appearance. On Februay 15, 1895, the plaintiff served notice of motion asking for liberty to sign final judgment for the sum endorsed on the writ and costs with costs of the motion. The motion was grounded on an affidavit by the plaintiff which proved the debt, and alleged that the defendant was executor of the deceased debtor, that he had dealt with the

(1) 2 Dowl. 277.
(2) 1 B. & Ald. 254.
(3) 8 Taunt. 129.
(4) 16 L. R. Ir. 474.

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assets of the deceased and had assets in his hands. The defendant filed an affidavit to resist the motion, from which it appears that the deceased had died on October 27, 1894; that the defendant took out probate on January 12, 1895; that the aggregate assets amounted to £80 8*s.* 1*d.*; that the defendant himself was a creditor of the deceased to the extent of £427 2*s.*, which debt was partly secured; that he had disbursed moneys of his own in paying some of the deceased's debts to the amount of £22 10*s.*; that he had fully administered the estate to the extent of the assets that had come to his hands, and that there were now no assets to pay the plaintiff.

In *Ingham* v. *Treacy* the facts were substantially the same, the debt sued for being £34 15*s.* 10*d.*

In each case the Exchequer Division made the same order, viz. that the plaintiff be at liberty to sign judgment of assets *quando acciderint in futuro* against the defendant as executor of Michael Treacy, deceased, for the amount of his debt, together with his costs of suit, and also £4 4*s.* odd, as and for the costs of the motion; "said debt and costs to be only levied off the estate and effects of said Michael Treacy, deceased, which may hereafter come to the hands of the said William Treacy to be administered." The defendant had asked the Divisional Court to give him his costs in each action against the plaintiff, but the Court refused his application, and accordingly the present appeals have been taken on the ground that the costs were not given to the executor against the plaintiffs.

The following rules have been recognised as regulating the liability to costs in cases where an executor was sued at common law for the debt of his testator:—1. If a creditor sued an executor as such and got judgment against him, whether by default or after verdict, the judgment was for the debt and costs to be levied off the goods of the deceased in his hands, and if none then for the costs out of the proper goods of the executor; 2. If the executor pleaded *plene administravit*, and the plaintiff creditor replied admitting the plea and praying judgment against assets in future, the judgment was for debt and costs to be levied out of such future assets; costs were not awarded against the executor personally, but neither did he get costs; 3. If the executor pleaded

plene administravit (even with other pleas) and succeeded at the trial, the defendant got his costs of the action against the plaintiff.

If a plaintiff seeks by a summary motion to get a judgment, the effect of which will, 1, conclude the existence of assets in the hands of the executor; and, 2, make the costs payable by the executor *de bonis propriis*, it would seem to me just and right that the executor should be at liberty to set up by affidavit the plea of *plene administravit* which prevents the happening of those consequences, and either get the motion refused with costs altogether; or, if the Court thought fit, on the statements in the defendant's affidavit, to give a judgment of assets *quando*, then to obtain the terms that such summary judgment should be given on the condition of the plaintiff paying the costs of the unfounded motion. This seems to have been the *ratio decidendi* of *Millar* v. *Keane* (1), a case which has been followed in England.

In the cases before us costs have not been given to the executor, and the withholding of the costs is the ground of appeal: and the appeal has been resisted almost entirely upon the ground that it is one for costs only. For the appellant it is contended that a principle is involved and therefore that an appeal lies. The test put by Lord Justice James in the case of *The City of Manchester* (2), seems to me to apply, viz. were costs withheld on the ground of the conduct of the parties, or by reason of the application of a supposed rule of law? It cannot, I think, be that cases might not arise in which the conduct of the executor would not be sufficient to deprive him of costs, and if it be once conceded that the Court has a discretion in a possible state of conduct, then the giving or withholding of costs on the ground of conduct is the subject of a judicial discretion, which even if (for argument's sake) wrongly exercised, is not open to review, unless leave to appeal be given. On the other hand, if costs were withheld on account of something in the position of an executor against whom a judgment of assets *quando* is got, I think the application of a supposed rule of law arises, and an appeal lies.

Inasmuch as counsel were not agreed as to what took place in the Court below, we communicated with the Exchequer Division,

(1) 24 L. R. Ir. 49. (2) 5 P. D. 222.

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and Mr. Justice Andrews has been kind enough to furnish us with a note in which he states that the orders appealed from were not made in the exercise of mere discretion, nor so as to interfere in any way with an appeal. We are therefore bound to entertain the appeal, and have to decide between the conflicting views of the Queen's Bench Division in *Millar* v. *Keane* (1) and of the Exchequer Division in these two cases.

The decision of the Queen's Bench Division has been followed in England, and inasmuch as the plaintiffs have appealed to a special statutory jurisdiction in order to obtain a final judgment by a process by which the Common Law would not give it to them, and have failed to obtain that final judgment, and are content to take the judgment of assets *quando*, I think they ought to pay for the costs of the unfounded motion which they instituted.

The defendant therefore must get his costs below against the plaintiff as a term of the indulgence of getting the judgment assets *quando*, and he must also be paid the costs of these appeals.

Solicitor for the plaintiff Cockle: *E. J. Collins.*
Solicitor for the plaintiff Ingham: *E. T. Mulhall.*
Solicitor for the defendant: *Carrigan.*

G. Y. D.

(1) 24 L. R. Ir. 49

FOGARTY *v.* SHANAHAN (1).

(1895. No. 2960.)

Q. B. Div. 1895. Nov. 24, 27.

Appeal. 1896. Jan. 23.

Landlord and tenant—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *sect.* 2—*Sub-division or sub-letting without the consent of the landlord in writing.*

An assignment, by a tenant from year to year of a holding to which the Land Law (Ireland) Act, 1881, applies, of portion of such holding, is absolutely and for all purposes void, unless and until the landlord has consented thereto in writing, as required by sect. 2 of that Act.

The defendant, a tenant from year to year of a holding to which the Act of 1881 applied, assigned by deed a portion of his holding to the plaintiff, and, the landlord having refused his consent, the defendant gave the plaintiff his bond (of even date) for £90, the amount of the purchase-money, conditioned in the event of the plaintiff being disturbed in his possession, or sustaining loss because of the landlord's consent not having been obtained. The plaintiff entered into possession, and, being disturbed in his possession by the defendant, sued him on the bond, and at the trial obtained a verdict for £78. The landlord had throughout refused to give his consent to the sub-division. On new trial motion to the Queen's Bench Division, and on appeal therefrom to the Court of Appeal:—

Held, that the assignment being absolutely void, and the defendant having it thus in his power to eject the plaintiff, and having in effect dispossessed him, the verdict was right.

NEW TRIAL MOTION.

The action was brought on a bond for £90 given to secure the plaintiff (who had bought a portion of the defendant's farm) in case he should be disturbed in the possession of the portion assigned to him by reason of the landlord's consent not having been obtained.

The defendant, a tenant from year to year of an agricultural holding on the estate of Sir John Carden, by deed dated the 3rd January, 1894, assigned, as beneficial owner, a portion of his holding (a field containing about three and a-half acres, to the

(1) In the Queen's Bench Division before O'BRIEN, JOHNSON, and HOLMES, JJ.

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plaintiff, subject to an an acreable proportion of the rent of the entire holding, for the sum of £90; and, the landlord having given no consent to the assignment, the defendant, on the same day, gave the plaintiff his bond for £90. This bond recited the deed of assignment, whereby the defendant had "purported to convey" to the plaintiff portion of the holding of which he was tenant to Sir John Carden; recited that, "the consent of the said Sir John Carden not having been obtained for such assignment," it was agreed that the defendant should enter into this bond in the sum of £90, being the amount of the purchase-money; and stated the condition thereof as follows:—"Now, the condition of the above-written bond is such that if the said John Fogarty, his executors, administrators, or assigns, be not disturbed in possession of the portion of lands expressed to be so assigned, and if no loss, action, or claim, be sustained or made against him or them because of the consent of the said Sir John Carden to such assignment not having been obtained thereto, the bond shall be void, otherwise the same shall remain in full force."

The plaintiff's evidence at the trial was to the effect that, after payment of the £90, he got possession of the field; that, subsequently, on several occasions he asked the landlord to accept him as tenant, and tendered to him his share of the rent, which was refused; and that, on several occasions, he tendered his share of the rent to the defendant, and that the defendant refused to take it. He also gave evidence of disturbance in his enjoyment of the field by acts of trespass of the defendant, interference with fences and expulsion of the plaintiff's cattle. This evidence was corroborated by Maher, a labourer in the plaintiff's employment. Sir John Carden was examined, and stated that the defendant was his tenant, under an old take of an agricultural holding; that he had never consented to, and had refused to ratify the transaction; and that the defendant Shanahan had paid him the entire rent (1).

(1) The defendant's evidence went, at most, to show, as was contended by his counsel at the trial and on the new trial motion, that the alleged acts of disturbance were acts of mere trespass; but, in view of the finding of the jury and the opinion of the Court, it may, for the purposes of this report, be taken that the defendant substantially dispossessed the plaintiff.

The jury found that the defendant disturbed the plaintiff, but said that there was no sufficient evidence that the disturbance was because of the want of Sir John Carden's consent; they assessed the damages at £78, for which sum judgment was entered. The learned Judge who tried the case, Gibson, J., stated in his report, "I thought the case turned on whether the defendant was entitled by reason of the want of consent to eject the plaintiff. If he was, his action in disturbing the plaintiff must be attributed to his title, and the second finding of the jury is immaterial. On the other hand, if his action was a trespass, the verdict would be clearly wrong, the damages being calculated on complete loss of the farm, and not for a temporary trespass before action.

Ross, Q.C., (*M. B. Cooper*, with him) for the defendants, contended, 1, that there had been no expulsion or disturbance within the condition of the bond, that condition applying only to disturbance by the landlord; and, 2, that the second section of the Land Law Act of 1881—this being an agricultural holding and within the Act, though no fair rent had been actually fixed—did not make the assignment void, but voidable merely at the option of the landlord (thus distinguishing *Ormsby* v. *Crean* (1)); that, as between assignor and assignee the assignment was valid, and that the assignee was in lawful possession, and could not be ejected by the defendant—relying on *Ryan* v. *Byrne* (2); *Glenn* v. *Brennan* (3); and *Waller* v. *Farrelly* (4).

[HOLMES, J., referred to *Johnson* v. *Egan* (5)].

Counsel also relied on the different language of the Landlord and Tenant Act, 1860, ss. 10 and 18, and the Subletting Acts, 7 Geo. 4 and 2 Wm. 4, as distinguishing the decisions under those Acts.

George Wright, Q. C., and *Ignatius J. O'Brien*, for the defendant, contended, 1, that there was an ouster by the defendant, within the condition of the bond; and 2, that section 2 of the Land Act of 1881 made the assignment absolutely void, the pro-

(1) 20 L. R. Ir. 526.
(2) 17 Ir. L. T. R. 102.
(3) Lawson's Reg. App. (1895), p. 10; FitzGibbon's Reg. App. (1895), [p. 72.
(4) 28 L. R. Ir. at p. 130.
(5) [1894] 2 Ir. R. 480.

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hibition being absolute, and so intended, not merely in the interest of the landlord, but as a matter of public policy. They relied on the language of and the decisions under the Subletting Acts (7 Geo. 4 and 2 Wm. 4) and the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154, ss. 10 and 18), citing *Gillman* v. *Murphy* (1) and *Jagoe* v. *Harrington* (2); and on sections 2 and 5 of the Act of 1881, citing *Ormsby* v. *Crean* (3) and *Murtagh* v. *Allen* (4). *Glenn* v. *Brennan* (5) was a decision on the Franchise Acts, and did not support the contrary view.

Ross, Q.C., in reply.

Cur. adv. vult.

Nov. 27.

O'BRIEN, J.:—

This was a motion for a new trial, made in a case tried before Mr. Justice Gibson, in which one person sued another upon a bond for the sum of £90, which was given by the assignor of a small portion of land to his assignee on the occasion of the assignment, or in immediate connexion with that transaction; and the object of the bond was to secure the assignee—who was buying the land, a small plot, forming part of a tenancy from year to year, and containing not more than about three acres—against eviction from the land, as the landlord had given no consent to the assignment.

Upon the facts and the substantial effect of the evidence, and upon the result of the trial before the jury of those facts, there can be no doubt whatever. The jury found that the condition of the bond had been broken, that the assignee had been disturbed; and they added another finding, which, apart from the consideration whether they had any evidence before them for determining the question, was treated, in one view of the case, as immaterial, and seems to me to be immaterial, that there was no sufficient evidence that the disturbance was caused by reason of the want of consent of the landlord, Sir J. Carden.

One argument addressed to us on behalf of the defendant was

(1) Ir. R. 6 C. L. 34.
(2) 10 L. R. Ir. 335.
(3) 20 L. R. Ir. 526.
(4) 27 L. R. Ir. 118.
(5) Lawson's Reg. App. (1895), p. 10; FitzGibbon's Reg. App. (1895), p. 72.

that the breaking off of the arrangement, supposed to involve the violation of the bond, was not owing to the defendant, the assignor, at all, but was in reality owing to the plaintiff himself, who found that his title was defective, in the absence of Sir John Carden's consent, and, becoming anxious, himself created the difficulties which led to the supposed disturbance, without there being in fact any disturbance by his own assignor. That might not be an unlikely thing to happen. It might well be that the assignee paid his money in the first instance, and, afterwards, finding that he could get no declaration of consent from the landlord, became apprehensive, and was desirous of getting out of his bargain. That, in itself, is not an unlikely thing, and Mr. Ross pressed this view upon us strongly; but, in my opinion, it is entirely opposed to the facts of the case, because afterwards, even on no less than two occasions after the plaintiff had ascertained that Sir John Carden would not consent, the plaintiff went to him and offered him the rent, when it was not received; and, notwithstanding this, the plaintiff did not break off, but went to his assignor and tendered the amount of the rent, which he too would not receive, a thing most unusual on the part of a tenant; and the statement of Maher, one of the witnesses examined, most undoubtedly shows a design on the defendant's part to break through the agreement, for he says, among other statements of his own, that the defendant had said to him, "It was only the breaking of a man's word," considering, not unnaturally, that it was but a slight thing for a tenant, under the education he has been of late receiving, to break his word. This was the view he took, and I have no doubt that the defendant discovered that in some way, by a perverse and crooked use of the law, he might be enabled to break through this agreement, and hoped, in case Sir John Carden did not interfere, that by means of a "delicate stratagem" he might put the plaintiff out, knowing that he could not come back. For my part I see no reason to doubt that the jury were right in their finding that there was a disturbance.

Now the case depends mainly on the position of the assignee, after his expulsion and the trespass of his assignor, the defendant; and to determine this, we are called upon, for the first time, directly to put a construction upon section 2 of the Act of 1881.

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This is not indeed the first time that the question has arisen, for it was noticed incidentally in this Court upon another occasion in a case to which Mr. Justice Holmes has referred: *Johnson* v. *Egan* (1), where it was assumed, by the Court at least, though not expressly debated, that the effect of section 2 was to invalidate such an assignment to all intents and purposes.

The same point arose in the Court of Appeal in a registration case (*Glenn* v. *Brennan* (2)), where there had been a subletting, contrary to sect. 2 of the Land Act of 1881, without the landlord's consent, of a tenancy within the Act, and the question was, whether the sub-tenant was qualified to vote. I take it as absolutely certain, from the perusal I have had of the reports of this case, that both the Master of the Rolls and Lord Justice FitzGibbon in very clear terms expressed their opinion that the effect of the 2nd section was to make such assignment void for all purposes; and I was a little surprised to find that the result was in favour of the franchise; but this result, to my mind, most manifestly must have gone upon a different ground—that "occupy" in the Act of Parliament was the condition which it was necessary to satisfy, and that even a licensee or person occupying under a void assignment would have the franchise. This seems the only way of reconciling the actual result with the view expressed by the Master of the Rolls and Lord Justice Fitz Gibbon.

Now the matter comes before this Court in a form requiring a direct decision, and I myself entertain no doubt at all upon it. The question involves, of course, some review of the law upon assignments of leases; but it must be borne in mind that the Act of 1881 is not an isolated enactment, and comes at the end of a code which has been in existence in Ireland for a considerable time. This code, it may be, was established in the interest of one class, and may now have undergone a change in that respect, but there it stands at all events. The first case in which the question arose, and in which it was illumined by the genius of Chief Justice Bushe, was *Troy* v. *Kirk* (3), where the question was whether an assignment contrary to a clause in the lease against assignment,

(1) [1894] 2 Ir. R. 480.

(2) Lawson's Reg. App. (1895), p. 10; FitzGibbon's Reg. App. (1895), p. 72.

(3) Alc. & N. 326.

and contrary to the Subletting Acts, was void merely, or voidable —a question often agitated and discussed in this country since the Act of 1860. The Act under which this question thus first arose was the first Subletting Act of 1826 (7 Geo. 4, c. 29), which, in its 3rd section, provided in effect that no waiver can take place except in writing—this contention having been very frequently used by sub-tenants to defeat the statutory provisions against alienation. This Act also provided that, in the case of a subletting made during the interval of time between 1826 and 1832, contrary to these Acts, the assignor should have no remedy by distress or otherwise for any rent reserved by him on such assignment. The main provision was re-enacted in the Amending Act of 1832 (2 Wm. 4, c. 17), by sect. 2 of which, in cases of leases containing a prohibition against alienation, all assignments were required to be made with the consent of the lessor in writing; and the section contained these words, which are confined to that statute, that, unless so made, the assignment or sub-lease should be "wholly null and void to all intents and purposes whatsoever," and this continued to be the law down to 1860.

The absence of these words in the Landlord and Tenant Act of 1860 (23 & 24 Vict. c. 154, sections 10 and 18) has given rise to much argument, as involving a distinction in construction between the Act of 1832 and that of 1860; but the same class of argument that has been used in the present discussion, and indeed upon the discussion of all the cases under the Act of 1860, was used before Chief Justice Bushe in *Troy* v. *Kirk* (1), namely, that the subletting or alienation could not be void to all intents because the landlord could at any time confirm it; and it will be observed that in the Court of Appeal, in the recent case of *Glenn* v. *Brennan* (2), this very argument was addressed to the Court by Serjeant Dodd. Chief Justice Bushe, however, gave no effect to the objection, and held that, although the landlord might at any time ratify the subletting, still it must be considered under the terms of the statute to be void "to all intents and purposes whatsoever" before ratification.

When the question arose under the Act of 1860 these words

(1) Alc. & N. 326.

(2) Lawson's Reg. App. (1895), p. 10; FitzGibbon's Reg. App. (1895), p. 72.

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were, of course, very much relied upon as establishing a distinction between the two Acts. The Courts, however, did not give effect to the distinction, and adopted the same rule of construction as was laid down in *Troy* v. *Kirk* (1), holding that no interest passed under such assignment, and that the lands so aliened might be taken under an execution against the assignor. That was the decision of the Court of Common Pleas in *Butler* v. *Smith* (2), and has been followed since; and, as was admitted by Christian, L.J., in *Foley* v. *Gallagher* (3), the former policy of the law was not in any way disturbed by the Act of 1860.

Passing now from these decisions, we have at present a new code under the Acts of 1881 and 1887. These Acts, however, cannot be at all regarded as things apart; they must be considered rather as part of a long-established and continued course of legislation, the policy of which was to give to the owner of property some control over subletting and alienation; and it would be a remarkable consequence, if any distinction were drawn in this respect between the Subletting Acts and the Act of 1860, or between the Act of 1860 and the Acts now in force, or to hold that while the Act of 1860, which contains the words "it shall not be lawful," absolutely prohibited subletting or alienation, the 2nd section of the Act of 1881, which uses the words "shall not," would not have the same effect at all; and the effect would be that thus different considerations would apply in different cases—to those who were not present tenants under the Act of 1881, and those who were—though the persons held under the same relation of landlord and tenant, and under the same code of laws. And further, not only would that happen, but in this case sect. 2 of the Act of 1881 must receive a different construction from sect. 5; for the 5th section gives a power, which never existed before, in cases of tenancies from year to year on which a fair rent had been fixed—a power distinct from that which existed formerly under the clause of re-entry—under which the landlord may eject the tenant. The section does not simply declare that the assignment or subletting could not exist at all, or that the assignor could recover no rent. It gives to the landlord an absolute power to evict for

(1) Alc. & N. 326. (1) 16 Ir. C. L. R. 213. (3) 2 L. R. Ir. 412.

breach of the statutory condition, and I can see no reason at all for attributing a different meaning to the words in sect. 2, "shall not . . . subdivide or sublet," from that which they bear in sect. 5, which undoubtedly gives the landlord a greater power than existed under the Subletting Acts or the Act of 1860—a power, not merely avoiding the assignment, but enabling the landlord to determine the tenancy altogether. Were we to give a different construction to sect. 2, we should produce a state of confusion that would have no end; and, whatever view may possibly be entertained of the original intention of the Acts of 1826 and 1832, or as to the intention of the Act of 1860, I am of opinion that there is now a course of law, established by actual legislation and judicial decision upon the subject, which makes it imperative upon us to put the same construction upon this as was placed on the earlier statutes.

Then how does the matter stand? Mr. Justice Gibson, putting the point very accurately, said that the case depended on the question whether the defendant was entitled by reason of the want of consent on the landlord's part to eject the plaintiff—not to put him out by force, for that might be a trespass, he being a licensee—but to eject him by process of law. I am of opinion that the defendant had the right to eject the assignee, and that the assignee could not have come back again. He would have had no right to enter; and, according to my view, the assignor could have brought an action of ejectment against him, and could have put him out of possession. That brings the matter within the test proposed by Mr. Justice Gibson.

The question still remains whether this was a breach of the bond so as to enable the plaintiff to recover back his money—whether this came within the condition of the bond, that is to say, that, if the plaintiff should not be disturbed in possession of the portion of lands so assigned to him, and if no loss, action, or claim should be sustained by or made against the plaintiff, because of the consent of the said Sir John Carden to such assignment not having been obtained, then the bond should be void. I am of opinion that this was a disturbance, that this man took advantage of the state of the law, and by his own act has disturbed the plaintiff's possession. If the assignor had done no act,

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this might perhaps not be so; but here the defendant himself took direct steps against the plaintiff. I therefore must come to the conclusion that there was here a disturbance within the condition of the bond; and, if I had been sitting at the trial and any objection had been taken to the form of the plaintiff's claim I should have been ready to have allowed an amendment, if that were necessary, adding a claim for breach of the implied covenant under the Act of 1860.

JOHNSON, J.:—

The question in this case turns on the construction of the bond and of the second section of the Land Act of 1881. The plaintiff contends that he has been "disturbed" within the meaning of the condition of the bond. The defendant denies this contention, and asserts that his acts, of which the plaintiff complains, are at most trespasses, and that the plaintiff may retake possession of the land comprised in the assignment of even date with the bond, peaceably or by ejectment. The substantial question is whether the assignment was operative to convey any legal interest in the land to the plaintiff. When there is a written instrument, which contains a contract of tenancy, an agreement that "it shall not be lawful for the tenant to sublet or let in conacre" without the required consent, the Landlord and Tenant Act, 1860, section 18, invalidates and avoids any act of the tenant so prohibited: *Jagoe* v. *Harrington* (1), following *Butler* v. *Smith* (2). A parol yearly tenancy was not dealt with either by the former Subletting Acts, 7 Geo. 4, c. 29, or 2 Wm. 4, c. 17, or by the Landlord and Tenant Act of 1860, because the landlord had the remedy in his own hands (if he desired to exercise it) by refusing to recognise the subletting, serving notice to quit, and determining the tenancy. This power was very effectually interfered with and restricted by the Land Acts; and, as part of the same code, the Land Act of 1881, by section 2, in express terms, in the case of a parol yearly tenancy, prohibits subletting (but not lettings for temporary pasturage or in conacre) without consent. "The tenant from year to year shall not, without the consent of the landlord in writing, subdivide his

(1) 10 L. R. Ir. 335. (2) 16 Ir. C. L. R. 213.

holding or sublet the same or any part thereof," &c. I fail to see any difference in the meaning of the Legislature when it says, "it shall not be lawful" for a tenant to do an act, and the tenant "shall not" do such act. The expressions are equivalent; the prohibition is of the same cogency and effect; and, as Lord Tenterden says (1), "The Court is bound in the administration of the law to consider every act to be unlawful which the law has prohibited to be done." I therefore think that the assignment to the plaintiff was unlawful, prohibited by statute, inoperative to pass any interest in or lawful possession of the land mentioned in it, or to sustain either peaceable entry or ejectment. "It may be taken as a received rule of law that what is done in contravention of the provisions of an Act of Parliament cannot be made the subject of an action" (2), is Lord Ellenborough's sound exposition of this principle of the law. The jury had evidence that the defendant expelled the plaintiff from the land, and has kept him expelled, and refused to receive from him any contribution towards the rent. The jury therefore were justified in finding (as they found) that he was disturbed in the possession of the land by the defendant.

The plaintiff's purchase-money for the assignment was £90; but, if the landlord refused his consent, the assignment might be valueless, and therefore, to secure the plaintiff either in the land, or, in default of the land, in his purchase-money, the bond recites that the landlord's consent had not been obtained, and that it was agreed that the defendant, and one Maher, should enter into the bond for £90 (the amount of the plaintiff's purchase-money) to indemnify the plaintiff against (*a*) being disturbed in possession of the land, or (*b*) any loss resulting from the consent of the landlord not having been obtained. The plaintiff has been disturbed in the possession, and therefore the condition has not been performed, and the bond is forfeited, and the verdict and judgment ought to stand.

HOLMES, J.:—

The construction sought to be placed on the bond by the defendant, by which liability under it is confined to a disturbance

(1) 3 B. & Ald. 183. (2) 1 M. & S. 596.

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of the plaintiff's possession by the landlord, is, I think, neither natural nor reasonable. The condition of the bond indeed contains a recital that the consent of Sir John Carden to the assignment had not been obtained; but the object of this recital is to indicate the nature of the defect in title against the consequences of which the plaintiff was to be protected, and not to limit the meaning of the words that follow. The language of the condition is sufficient to embrace any disturbance of the plaintiff's possession, and any loss he might sustain by reason of the landlord's consent having been withheld; and it would almost amount to moral perversity to hold that a condition so framed is not broken when it is the vendor himself who takes advantage of the bad title, and ejects, and keeps ejected, his purchaser. The jury have found that the defendant disturbed the plaintiff, in other words, put him out of possession; and I agree with Mr. Justice Gibson that the plaintiff's right to judgment for the amount of the bond depends on whether the defendant, notwithstanding the assignment, was entitled to recover possession of the lands assigned. If he was, he is now the legal owner, and the plaintiff is completely deprived of the property and has lost the purchase-money. If he was not, the plaintiff has not been disturbed, or suffered loss in any sense contemplated in the condition of the bond.

The solution of this question is to be found in the second section of the Land Law (Ireland) Act, 1881. Before that statute a tenant from year to year, unless prohibited by the contract of tenancy, was entitled to sub-divide the holding and convey part of it to a purchaser. The landlord might think his doing so a good reason for serving a notice to quit; but the assignee could not be disturbed as long as the tenancy continued. Has the law been changed in the case of a tenancy to which the Act of 1881 applies by a provision that declares that a tenant from year to year shall not, without the consent of the landlord in writing, sub-divide his holding, or sub-let the same or any part thereof? Mr. Ross, on behalf of the defendant, says in effect, if not in express terms, that the section under consideration introduces no change, and that the position of the parties is precisely what it was before. He may not accept this view of his argument, but no other conclusion can be drawn from it. The tenant can legally

vest a part of his holding in another. He thus can sub-divide as completely as he could have done before the year 1881; and therefore his position is unchanged. The assignee becomes legally entitled to what is conveyed to him; and, as the landlord has no new right conferred on him, the only mode in which he can punish or get rid of the incomer is by determining the tenancy. Therefore neither the landlord nor the assignee is benefited or injured by the legislation. I do not overlook the suggestion that the object of the section is to exclude a tenant who sub-divides or sub-lets from the advantages conferred on present tenants by subsequent provisions of the Act. But the second section has not this effect. The definition of tenant in the 57th section imposes the condition of occupation, and thus deprives a tenant who, without the landlord's consent, has ceased to occupy part of the holding from the benefits of the statute; but this is wholly independent of the second section, which, in my opinion, bears a very clear and intelligible interpretation.

When a statute declares that a person shall not do a thing, without prescribing the consequences of his doing it, effect can be given to the enactment in one of two ways: The doing it may be held to amount to a criminal offence and to be punishable as a misdemeanour; or it may be held that the attempt to do it is absolutely void and futile. The former construction is what would naturally be given if the act is forbidden in the public interest. But it can hardly be said that this is the object of a provision which limits the prohibition to cases in which the consent of a third party has not been obtained. The policy of the section is that a holding is not to be sub-divided against the will of the landlord; and, in the absence of some power enabling the landlord to take active steps, the best mode of securing the object aimed at is to make legal sub-division impossible. This, I think, is what the section declares. Anything amounting to sub-division is an illegal act, and is therefore null and void to all intents and for all purposes. This construction is strictly analogous to that placed on the 10th and 18th sections of Deasy's Act. Those provisions are only supplementary to and explanatory of an express contract entered into by the landlord and tenant, and they declare that it will not be lawful to do what is prohibited or

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restrained by such contract, except with the consent of both parties, given in a prescribed manner. There it might have been argued with some plausibility that the remedies which the landlord might resort to for breach of the agreement, expressly made with the tenant, were still available when the agreement was modified by the Legislature, and that nothing further was required. But, notwithstanding this possible view, it has been settled by a long series of decisions that any attempt to do what is declared unlawful is void absolutely and for all purposes. *A multo fortiori*, the same result follows from the second section of the Act of 1881. I am therefore of opinion that the plaintiff is entitled to hold the judgment given in his favour by Mr. Justice Gibson.

A. E. R. J.

Appeal. 1896.

Jan. 23.

The defendant appealed to the Court of Appeal (Lord Ashbourne, C., Fitz Gibbon, Barry, and Walker, L.JJ.)

Ross, Q.C., and *Cooper*, for the appellant:—

The 7 Geo. 4, c. 29, s. 3, enacts that any subletting without the prescribed consent "*shall be and be deemed wholly void and invalid.*" When the Act of 1860 prohibits subletting it says (section 18), "*it shall not be lawful* for the tenant to sublet," and it was held that the result of this prohibition was the same as that contained in the earlier Act, *i.e.* to make any attempt at subletting without consent "wholly void and invalid": *Donoughmore* v. *Forrest* (1). In a long series of decisions this result has been steadily upheld notwithstanding the criticisms of Fitz Gerald, B., and Christian, L.J. The Legislature knew well the judicial interpretation that had been placed upon the phrase "it shall not be lawful." Yet in the second section of the Land Law (Ireland) Act, 1881, it deliberately drops the older form of prohibition and says merely the "tenant *shall not* sublet." Its intention was not to make a subletting by a yearly tenant to which the Act applies void, but merely in such a case to preserve the *status quo*. The effect of the section is simply to keep a tenant who has violated

(1) I. R. 5 C. L. 443.

the prohibition from fixing a fair rent. Had the Legislature intended to make the subletting void it would have used the phrase to which judicial interpretation had already given that effect: Hardcastle on Statutes, p. 156. The policy of the statutes of 1881 and 1887 is to confer a benefit on a tenant in *bona fide* occupation of his holding: a subletting made by a tenant without his landlord's consent so far from being a nullity is a bar to the tenant's obtaining this benefit (44 & 45 Vict. c. 49, ss. 21 and 57; 50 & 51 Vict. c. 33, s. 1). The very exception made by the Legislature in favour of "trivial" sublettings (50 & 51 Vict. c. 33, s. 4) shows that it did not contemplate a subletting as a nullity: a subletting cannot be said to be either "trivial" or "not trivial" if it is wholly void.

The prohibition against subletting contained in section 2 imposes a new disability on the tenant: the remedy conferred on the landlord for a violation of the prohibition is given by section 5, which enables the landlord to evict the tenant who sublets for breach of a statutory condition; and section 13 provides that proceedings taken to evict for breach of a statutory condition may on the application of the tenant be stayed and compensation awarded in satisfaction of the breach. It cannot be said that a subletting without the landlord's consent is so contrary to the policy of the Act as to be null and void if it can be set up the Land Commission and compensation awarded in respect of it.

It has been settled by a decision of this Court that a subletting like that in the present case is not void. In *Glenn* v. *Brennan* (1) this Court held that a man to whom a subletting had been made contrary to section 2 of the Act, 1881, was entitled to a franchise dependent upon his being in occupation of the premises so sublet "as tenant," and it has been conclusively settled by a decision of this Court that the occupation necessary to confer this franchise must amount in law to possession referable to an estate in the premises: *Hollands* v. *Chambers* (2). There cannot be an estate in the premises under a void deed: so too it has been held the effect of section 1 of the Act, 1881, was so to modify the former law prohibiting alienation contrary to agreement as to

(1) 29 I. L. T. R. 79. (2) 32 L. R. Ir. 156, at p. 161, *per* Palles, B.

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render an assignment by the tenant contrary to such agreement not void but only voidable at the option of the landlord: *Hughes* v. *Higgins* (1); *Wright and Tittle's Contract* (2).

Wright, Q.C., and *Ignatius J. O'Brien* for the respondent, were not called upon.

LORD ASHBOURNE, C.:—

We do not think it necessary to call on counsel for the respondent.

A narrow but bold contention has been put forward on behalf of the appellant. A certain class of phraseology has been adopted by the Legislature in a series of prohibitory enactments in the land code of Ireland, under which there is a complete chain of authorities deciding that any attempt to evade the statutory prohibition was void. The appellant argues that because, in sect. 2 of the Land Law (Ireland) Act, 1881, the Legislature departed somewhat from its previous phraseology, and substituted the words "the tenant shall not" for the words "it shall not be lawful for the tenant," it must be taken to have intended to detach from that prohibition the effect of all the previous decisions on the earlier prohibitory provisions in the code of Land Acts, and to declare that for the future an attempt to violate the prohibition should be unlawful, but not be void. It is a startling proposition that a consequence so momentous was intended to follow from so slight an alteration in the form of the prohibition. I cannot attribute to the Legislature the intention to introduce so great a change in the law when I do not find it expressed in clear and unambiguous language. I adopt the reasoning of the judgment delivered in the Court below by Mr. Justice O'Brien. It appears to me quite conclusive, and the appeal in which it is sought to be impugned must be dismissed, with costs.

FITZ GIBBON, L. J.:—

I desire to state the precise ground of my decision.

The Act 7 Geo. 4, c. 29, s. 3, enacts that any subletting without the written consent of the landlord, unless expressly authorised,

(1) 29 I. L. T. R. 82. (2) 29 L. R. Ir. 111.

"shall be and be deemed wholly *void* and invalid to all intents and purposes whatsoever." The Act of 1860, sect. 18, enacts that when there is "an agreement against subletting . . . *it shall not be lawful* for the tenant to sublet" without the express consent in writing of the landlord. The Act of 1881, sect. 2, enacts that the tenant from year to year of a tenancy to which the Act applies "*shall not*, without the consent of the landlord in writing, sublet."

It was at first open to doubt whether the words of the Act of 1860 had the same invalidating effect as the much stronger words of the Act of 1827, and made sublettings in violation of agreements *inter partes* void, as being illegal. But the authorities, from *Troy* v. *Kirk* (1) to *Donoughmore* v. *Forrest* (2) and *Gillman* v. *Murphy* (3), which are binding upon us, have put an end to this question, so far as we are concerned, and have held the effect of the Acts of 1827 and 1860 to be, in this respect, identical. That being so, it seems to me to be quite impossible to hold that the words "shall not" in the Act of 1881 are less effective than the words "it shall not be lawful" in the Act of 1860. "Thou shalt not steal" is, if anything, more peremptory than "It shall not be lawful to steal," and the public policy of the Acts of 1827 and 1881 indicates a scope for their prohibition of subletting at least as wide as that of the Act of 1860, whose expressed object was the enforcement of agreements *inter partes*.

As to *Glenn* v. *Brennan* (4), I can only say that, while I dissented from the decision, I did not understand, and I cannot assume, that it was supposed by those who concurred in it to be inconsistent with the decisions on the Act of 1860, as I think it would be if it decided anything more than that a man might "occupy as tenant," within the meaning of the Franchise Acts, though his occupancy was under a subletting which was prohibited, and was therefore void, under the Act of 1881. The attempt to limit the effect of the categorical prohibition of subletting in that Act, by referring it to the provisions as to fixing fair rent, and as to compensation only, could not, in my opinion, succeed unless the prohibition in the Act of 1860 ought also to have been limited to the purposes of the contract between the landlord and the tenant, and then the

(1) Alc. & Nap. 326.
(2) I. R. 5 C. L. 443.
(3) I. R. 6 C. L. 34.
(4) Lawson's Reg. Cases, 1894, 11.

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decisions upon that Act, avoiding sublettings as illegal, would be wrong.

BARRY, L.J., I concur.

WALKER, L.J.:—

I entirely concur. We must start with the proposition that where a statute says "it shall not be lawful to sublet," those words are equivalent to a declaration that any subletting attempted shall be absolutely void. That is the result of *Donoughmore* v. *Forrest* (1), by which it is decided notwithstanding the omission from the Act of 1860 of the declaration contained in the earlier statutes that a subletting in contravention of its provisions should be void—that the same effect followed from the prohibition contained in the later Act expressed only in the words "it shall not be lawful." I am unable to follow Mr. Ross's argument that the Legislature intended the words of section 2 of the Act of 1881 to mean something less than if they ran "it shall not be lawful to sublet or subdivide." The force of the enactment in both cases is derived from the statutory prohibitions. In my opinion section 2 is in furtherance of a general policy preventing subletting.

The main purpose of the Act was to establish fixity of tenure and fair rents for tenants in *bona fide* occupation of their holdings, that is of the entire of their holdings, and a provision which makes impossible a subletting which would be an obstacle to the tenant in a proceeding to fix a fair rent is in result for his benefit.

Solicitor for the plaintiff: *William Carrigan.*
Solicitor for the defendant: *A. H. Morgan.*

G. Y. D.

(1) I. R. 5 C. L. 443.

THE RIGHT HON. THE ATTORNEY-GENERAL FOR IRELAND, INFORMANT; THE REV. JOHN HALL AND PATRICK BYRNE, DEFENDANTS.

Ex. Div. 1896. Feb. 3, 4, 19, 21.

Charitable bequest—Masses for the repose of testator's soul—Celebration publicly in Roman Catholic Church—Purpose merely charitable—5 & 6 Vict. c. 82, s. 38—Legacy duty—Exemption.

A bequest to a Roman Catholic priest, to be applied for masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator's soul, is a valid charitable bequest, and exempt from legacy duty under the 38th section of the 5 & 6 Vict. c. 82.

INFORMATION to obtain a declaration that the defendants were bound to pay legacy duty on each of the following sums bequeathed by the will and codicil thereto, both next hereinafter referred to, of Christopher Cusack, now deceased, viz. :—(*a*) A sum of £50 to the Superior for the time being of the Society of Roman Catholic clergymen connected with the Roman Catholic Church in Clarendon-street, to be applied for masses for the repose of the testator's soul and of his wife's soul, to be celebrated publicly in said church; (*b*) a sum of £50 to the Superior for the time being of the Society of Roman Catholic clergymen connected with the Roman Catholic Church in Whitefriar-street, to be applied for masses to be celebrated publicly in said church for the repose of the testator's soul and of the soul of his wife; (*c*) a sum of £50 to the Rev. Father Walshe or other the Roman Catholic Parish Priest for the time being of SS. Michael and John's Roman Catholic Chapel, to be applied for masses to be celebrated publicly in said chapel for the repose of the testator's soul and of the soul of his wife; (*d*) a sum of £100 to the Superior for the time being of the Carmelite Church, Clarendon-street, to be devoted to the cleansing of the church; and (*e*) a sum of £100 to the Superior for the time being of the Carmelite Church, Whitefriar-street, to be devoted to the cleansing of the church.

Christopher Cusack, late of No. 30 Clarendon-street, in the

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city of Dublin, duly made and published his last will, dated the 7th February, 1884, whereby he bequeathed the following amongst other pecuniary legacies, viz. :—"To the Superior for the time being of the Society of Roman Catholic clergymen connected with the Roman Catholic Church in Clarendon-street, £50, to be applied for masses for the repose of my soul and my wife's soul, to be celebrated publicly in said church; to the Superior for the time being of the Society of Roman Catholic clergymen connected with the Roman Catholic Church in Whitefriar-street, £50, to be applied for masses to be celebrated publicly in said church for the repose of my soul and the soul of my wife; to the Rev. Father Walshe or other the Roman Catholic Parish Priest for the time being of SS. Michael and John's Roman Catholic Chapel, £50, to be applied for masses to be celebrated publicly in said chapel for the repose of my soul and the soul of my wife." And testator thereby appointed the defendants his executors.

The testator made a codicil dated the 25th December, 1885, to his said will, and he thereby directed his executors to pay the entire income derivable from his property to his wife for life, in addition to the legacy he had given her, and out of the residue of his property to pay the following, amongst other additional bequests, viz. :—"To the Superior for the time being of the Carmelite Church, Clarendon-street, the sum of £100 to be devoted to the cleansing of the Church; to the Superior for the time being of the Carmelite Church, Whitefriar-street, the sum of £100 to be devoted to the cleansing of the church."

By his said codicil the said Christopher Cusack directed his executors, the defendants, out of the residue of his property to pay the legacy duties on the respective legacies bequeathed by his said will and codicil.

The said testator died on or about the 9th March, 1887, without having previously revoked or altered his will and codicil; and probate of the said will and codicil was, on the 1st April, 1887, granted to the defendants, the Rev. J. Hall, and P. Byrne.

The defendants by their answer stated "that the Roman Catholic Church in Clarendon-street in the city of Dublin, the Roman Catholic Church in Whitefriar-street, and SS. Michael and John's Roman Catholic Chapel in the said will and codicil specified

are public churches and places of worship in the city of Dublin, and are daily open and are used for the purposes of public worship, and while so used are open for all members of the public. And the defendants stated that they refused to pay legacy duty on the said sums of £50, £50, and £50, or any of them, on the grounds that the said legacies are legacies 'given for a purpose merely charitable' in Ireland within the meaning of the statute 5 & 6 Vict. c. 82, s. 38, and as such are not chargeable with legacy duty, and that they refuse to pay the legacy duty claimed on the said sums of £100 and £100, respectively bequeathed by the said codicil to the will of the said Christopher Cusack deceased, on the grounds that the said legacies of £100 and £100 bequeathed by the said codicil are legacies given for a 'purpose merely charitable' in Ireland within the meaning of the statute 5 & 6 Vict. c. 82, s. 38, and are as such not chargeable with legacy duty."

The defendants submitted that legacy duty is not payable in respect of the said legacies or any of them.

The Attorney-General (*the Right Hon. J. Atkinson, Q.C.*), (with him *The Solicitor-General* (*Kenny, Q.C.*), and *C. E. Mac Dermot*), in support of the information :—

[Counsel stated that the Inland Revenue did not propose to contest the question of legacy duty in respect of the bequests (*d*) and (*e*).]

The question for the Court was, Were the bequests (*a*), (*b*) and (*c*), in the nature of charities within the meaning of the statute 5 & 6 Vict. c. 82, s. 38, so as to exempt them from the payment of the duty? The Inland Revenue Commissioners submitted that these bequests were not charities, and that accordingly they were liable to payment of the duty. It was not contended that a bequest for masses was invalid, nor that such a bequest was in the nature of a "superstitious use," nor that a bequest to promote any form of Christian religion was not charitable; but it was submitted that a bequest for masses to be said for the repose of the soul of a particular individual was not a charity, and therefore liable to duty like any ordinary bequest. To make a bequest charitable it must be shown that some public advantage to man-

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kind was contemplated by the testator. In *The Attorney-General* v. *Delaney* (1) the Lord Chief Baron suggested that if the bequest were for masses to be celebrated in public, he might hold that such a bequest was charitable. But in that case there was no direction that the masses were to be said publicly; and it was held that the bequest was not charitable. The other members of the Court did not express any opinion on the point suggested. In *Beresford* v. *Jervis* (2) and *M'Court* v. *Burnett* (3) the late Sir E. Sullivan, M.R., held that certain bequests for masses for the repose of the souls of particular individuals were void. In *Kehoe* v. *Wilson* (4) the Vice-Chancellor held that a bequest for masses to be said publicly was void. That decision is distinctly applicable here. It was followed by the Master of the Rolls in *Perry* v. *Tuomey* (5), an identically similar case; though the Master of the Rolls in his judgment suggested that were it not for *Kehoe* v. *Wilson* (4) he might have decided otherwise. The offering of the mass for the repose of the soul of a deceased individual involved an intention on the part of the priest celebrating it; and it was therefore a merely mental act. A mental act could not be enforced by any legal process; and therefore it could not be a charity, one of the essential ingredients of which was that it could be enforced by process of the Court of Chancery. [Counsel read the supplemental answer of Right Rev. Dr. Delaney in *The Attorney-General* v. *Delaney* (1).] The Court of Chancery could not enforce the trust; for although it could ascertain whether the masses were said or not, it could not ascertain whether they were said with a particular object and intention in the mind of the celebrant. [Counsel cited *Burke's Estate* (6).] The main and paramount purpose of the testator was to have masses said for the benefit of his own soul and the soul of his wife: his primary intent was to effect a private benefit, and his secondary intent was to effect his primary intent in such a way that the public could assist at the services; but there was no legal means of enforcing the primary intent. The history of the matter appears to have commenced with *The Commissioners of Charitable Donations and*

(1) Ir. R. 10 C. L. 104.
(2) 11 Ir. L. T. R. 128.
(3) *Ibid.* 130.
(4) 7 L. R. Ir. 10.
(5) 21 L. R. Ir. 480.
(6) 9 L. R. Ir. 24.

Bequests v. *Walsh* (1). But after the suggestion thrown out by the Lord Chief Baron in *The Attorney-General* v. *Delaney* (2) conveyancers added the clause requiring public celebration to drafts of wills. A charity, recognizable by Courts of Equity, implied a trust; and a trust was something which could be enforced; but the trust for the saying these masses in public could not be enforced, for everything depended on the mental act of the priest. Therefore this bequest could not be a charity. The doctrine of *cy pres* did not apply. As to the failure of a trust, see *Fisk* v. *The Attorney-General* (3).

A gift for any form of religious devotion or public edification would be charitable, provided it was expressly dedicated to the public interest; but such was not the intention of the testator in this case. A bequest to build a church would be charitable, for that would be distinctly in the interest of the public. But the testator expressed no special desire to benefit the public, and accordingly the case differed from the cases where bequests for public devotion or the furtherance of religious worship were held to be charitable, and particularly from the following cases:—*Durour* v. *Motteux* (4); *Straus* v. *Goldsmid* (5); *De Costa* v. *De Pas* (6); *Michel's Trust* (7); *Yeap Cheah Neo* v. *Ong Cheng Neo* (8). All those cases were distinguishable because in each of them the testator had no selfish object in view: each bequest was in furtherance of religion. [Counsel then cited the last vol. of Ruling Cases, pp. 577-8; and Tyson on Charities, pp. 441 and 444.] A bequest for masses to be said in public without any special object might be charitable; but the object and intention of the testator altered the charitable intent into a personal one. It was not shown that any greater facilities for public worship were to be gained by these bequests. None of the necessary ingredients to constitute a charity existed, and the case did not come within any of the decisions as to purposes "merely charitable." [Counsel cited *Tatham* v. *Drummond* (9), and *Mellick* v. *The*

(1) 7 Ir. Eq. R. 34 n.
(2) Ir. R. 10 C. L. 104.
(3) L. R. 4 Eq. 521.
(4) 1 Ves. Sen. 321.
(5) 8 Sim. 614.
(6) 2 Swanst. 487.
(7) 28 Beav. 39.
(8) L. R. 6 P. C. C. 381.
(9) 4 De G. J. & S. 484.

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Guardians of the Asylum (1)]. The legacies cannot therefore be held to be exempt from duty.

[By consent an attested copy of the supplemental answer of Dr. Delaney, referred to by the Attorney-General in his argument, was entered in evidence in support of the information.]

Carton, Q.C. (with him, *O'Connor, Q.C.*, and *D. F. Browne*), for the defendants:—

The American authorities cited in the *Ruling Cases* have no application, because the American law is essentially different from that in Ireland as regarded charities. A bequest for masses to be said publicly in a public church was essentially a charitable bequest, and the original motive of the testator, although a personal one, did not take from the charitable nature of the bequest. A gift for the maintenance or promotion of public worship was a good charitable bequest: *Powerscourt* v. *Powerscourt* (2). In that case a bequest for religious services was held to be a good charitable bequest. The case of *In re Darling; Farquhar* v. *Darling* (3) bore out the same proposition. A gift for the benefit of public religious worship must be deemed to be charitable: *Straus* v. *Goldsmid* (4); *Turner* v. *Ogden* (5); *Attorney-General* v. *Herrick* (6): *In re White; White* v. *White* (7). According to those decisions a gift for masses to be said in public was a charity: *Commissioners of Charitable Donations and Bequests* v. *Walsh* (8). Was the charitable nature of a gift to be taken away because the testator had in view his own spiritual advantage? A clear distinction could be drawn between what were charitable and what were merely benevolent objects.

Charity, in the highest sense of the word, meant the love of God, and manifested itself in doing good to one's neighbours; and it was further supposed that the donors of charity did good to their neighbours for the love of God, and because they were doing an act of charity. Every Christian who did an act of charity did

(1) 1 Jacob, 180.
(2) 1 Molloy, 616.
(3) [1896] 1 Ch. 50.
(4) 8 Sim. 614.
(5) 1 Cox, 316.
(6) 2 Amb. 712.
(7) [1893] 2 Ch. 41.
(8) 7 Ir. Eq. R. 34 n.

it for the benefit of his soul, and if the argument for the Crown applied, it would mean that a Christian could not make a valid charitable gift if his motive was the benefit of his own soul. Then the extraordinary consequence would follow that no gift would be charitable according to law unless it was made purely through humanitarian motives—in other words, the only person who could make such a gift would be an atheist. Whether the testator's motive was primary or secondary makes no difference ; for even if the testator's primary intention was to benefit his own soul, such a motive or intention could not affect the charitable character of the bequest: *Hoare* v. *Osborne* (1) and *In re Rigley's Trusts* (2) ; so that it was apparent that anything referring to a church, or the beautification of it, was charitable, no matter what the motive was. Supposing a testator had said, "I will give £1000 to the Mater Misericordia Hospital, for the benefit of that institution, and I give it in the hope and belief that such gift will be for the benefit of my immortal soul," surely such a gift would be charitable. The fact of personal motive, and a desire to secure personal benefit, did not interfere with the bequest when it was clear also that benefit to the public was intended. If there be a good charitable gift, it cannot cease to be charitable because a personal motive be superadded. The testator directed the masses to be said in public, and such a bequest tended to the promotion of the service of God and the interest of religion, and was therefore, within the meaning of the authorities, charitable. Additional facilities were afforded for public edification. As to whether the masses were really said for the repose of the soul of an individual, and the enforcement of such a trust, the case of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (3) is a sufficient answer, for in that case the Court ordered payment of the money. [Counsel cited *Reichenbach* v. *Quin* (4) and *The Attorney-General* v. *Bagot* (5).] *Kehoe* v. *Wilson* (6) is opposed to the current of authority. It was reluctantly followed by the Master of the Rolls in *Perry* v. *Tuomey* (7).

(1) L. R. 1 Eq. 585.
(2) 36 L. J. Ch. 147.
(3) 7 Ir. Eq. R. 34 n.
(4) 21 L. R. Ir. 138.
(5) 13 Ir. C. L. R. 48.
(6) 7 L. R. Ir. 10.
(7) 21 L. R. Ir. 480.

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C. E. Mac Dermot, in reply, cited *Morice* v. *Bishop of Durham* (1) and *Tatham* v. *Drummond* (2).

Cur. adv. vult.

PALLES, C. B.:—

This is an information for the recovery of legacy duty upon five legacies, amounting in the whole to £350, which were bequeathed by the will and codicil of Christopher Cusack, deceased. The defence is that the legacies are given for purposes "merely charitable, in Ireland," within the meaning of the statute 5 & 6 Vict. c. 82, s. 38, and as such are not chargeable with duty.

Two of the legacies of £100 each are directed to be devoted to the cleansing of the Carmelite churches in Clarendon-street and Whitefriar-street, respectively. It has not been, and in my opinion it could not have been, argued that the purpose of these legacies is not "merely charitable" within the above section; and as to them the information must admittedly be dismissed.

The remaining legacies are three, each being of a sum of £50. Two of them are in the same form, and are gifts "to the Superior for the time being of the Society of Roman Catholic Clergymen connected with" certain Roman Catholic Churches in the city of Dublin, "to be applied for masses for the repose of my soul and my wife's soul, to be celebrated publicly in said church." The third differs from the two others only in the description of the legatee: it is "to the Rev. Father Walshe, or other the Roman Catholic Parish Priest for the time being of SS. Michael and John's Roman Catholic Chapel"; and there is the same direction as to its application for masses, to be celebrated publicly in said chapel, for the repose of the testator's soul and of the soul of his wife. The residue of the estate is bequeathed to certain charitable societies and institutions, the localities of which are stated in the will, and are situate in Ireland, to be applied to their charitable purposes.

It is to be observed that it is not alleged that the "Society of Roman Catholic clergymen connected with" either of the specified

(1) 9 Ves. 399; 10 Ves. 521. (2) 4 De G. J. & S. 484.

churches, is a religious order or community bound by "monastic or religious vows" within the 10 Geo. 4, c. 7, s. 28; nor is it suggested that the bequests are, for any reason, illegal. It has, however, been argued for the Crown that, as it is of the essence of each bequest that the masses shall be celebrated with a particular intention, the existence of which can be known with certainty only to the priest himself, each bequest involves an element, the performance of which a Court of Equity cannot control, and that for that reason it would decline to give effect to the trust or purpose. The basis, however, of this information is the validity of these bequests. If they are invalid, and consequently void, the subject-matter upon which legacy duty is claimed by the information does not exist. In that event the amount of the legacies would fall into the residue, upon which, admittedly, duty is not payable. I shall recur to this subject later on; but for the present I shall assume the bequests to be valid, and that the question is whether they are "merely charitable," within the meaning of the above section.

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This question was left undecided by this Court in *The Attorney-General* v. *Delaney* (1), and by the late Sir Edward Sullivan, when Master of the Rolls, in *Beresford* v. *Jervis* (2). The same question, although in another shape, appears to have since come before the Vice-Chancellor in *Kehoe* v. *Wilson* (3)—a case in which the subject-matter of decision was not the liability to duty, but the validity of the bequest as a perpetuity; and the very question of the liability of such a bequest to legacy duty was considered by the present Master of the Rolls in *Perry* v. *Tuomey* (4). In *Kehoe* v. *Wilson* (3) the decision was that the bequest was not charitable, and was therefore void as tending to a perpetuity; but, unfortunately, the report of the case does not afford us the advantage of knowing what were the reasons of the learned Vice-Chancellor for this decision; and the decision of Lord Manners in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (5), to which I shall hereafter refer, and with which the judgment of the Vice-Chancellor appears to be in direct conflict, was not cited. The Master of the Rolls, in *Perry* v. *Tuomey* (4), was of opinion

(1) Ir. R. 10 C. L. 104.
(2) 11 Ir. L. T. R. 128.
(3) 7 L. R. Ir. 10.
(4) 21 L. R. Ir. 480.
(5) 7 Ir. Eq. R. 34.

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that such a bequest as we have here was not subject to legacy duty, for reasons which he fully stated; but, in deference to the previous decision of the Vice-Chancellor, he *pro forma* made an order, against his own opinion, for payment of the duty, leaving the parties, if so advised, to carry the case to the Court of Appeal, a course which was not adopted.

In this state of the authorities it was suggested whether we should hear the question discussed at all, instead of, by reason of the comity of Courts, following the decision in *Kehoe* v. *Wilson* (1). But if, by reason of that decision, we had declined to hear the question argued, we would have thereby refused to hear argument in support of the decision of the higher tribunal—the Lord Chancellor—a decision which the learned Vice-Chancellor, had it been brought to his notice, would have been the last to decline to follow.

I recur, then, to the question, are these bequests "merely charitable"? The meaning of the word "merely" has long since been decided in this Court in a manner by which we are bound. In delivering the judgment of this Court in *The Attorney-General* v. *Bagot* (2) Mr. Baron Fitz Gerald, *clarum et venerabile nomen*, said—"It seems to me quite enough to say, as was said by my Lord Chief Baron in the course of the argument, that the word 'merely' plainly admits of an equally sensible explanation in whatever sense the word 'charitable' is expounded. It can, therefore, afford no aid in arriving at the exposition of that word. You must first determine what is a charitable purpose before you can resolve whether a particular purpose suggested be or be not 'merely' so. On the other hand, we have as our guides, in ascertaining the meaning of the Legislature, two classes of decisions on the English Mortmain Act (9 Geo. 2, c. 36). First, in the construction of that Act, the words 'charitable uses' have been held to include bequests for all purposes which the Court of Chancery, acting on the principle already mentioned, holds to be charitable. Secondly, on that Act have arisen cases as to whether bequests are or are not for purposes merely charitable—those cases, viz. in which there is a bequest to particular legatees, to which the statute does not

(1) 7 L. R. Ir. 10. (2) 13 Ir. C. L. R. 48, 61.

apply, accompanied by a disposition void by the operation of the statute. In those cases the rule is that if the two objects are not inseparably blended, the bequest in favour of the unobjectionable purpose will be supported, though the charitable disposition should fail; but if the unobjectionable bequest be *so mixed up with the purpose of the charity as to be dependent on it*, the bequest must be considered indivisible and void. *Blandford* v. *Thackerell* (1) is an instance of the former class, and *Durour* v. *Motteux* (2) is an instance of the latter. These cases seem to me very clearly to show what is meant by a bequest merely charitable."

I proceed, therefore, to consider the question, Are the purposes of the bequests "charitable," within the meaning of the above section?

The judgment of Lord Manners in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (3), decided in 1823, is an actual decision upon the question. The question there arose upon the will of one Judith Rush, in which occurred the following bequests:—"I desire three *solemn* masses to be offered for the repose of my soul, one on the day of my interment, the other two in a month, and a twelvemonths' mind, at each of which I desire (if possible) to have thirteen clergymen to perform *the rites accustomed on these occasions*, to defray which I desire that my executors may pay the sum of £50 into the hands of the then Roman Catholic clergymen of the chapel of Mullingar for that purpose, as also the sum of £5 at each meeting, making in all the sum of £15, for the entertainment of said clergymen." The testatrix further bequeathed £1000 to her son, who was then abroad; and she desired that until the day of his return the same should be continued at interest, and that, out of the interest, £20 should be given yearly to a third clergyman of the parish of Mullingar, "with a request that he should offer a weekly mass for the repose of her soul and the benefit of her son." There were various other bequests, some of which were plainly charitable. The bill was filed to have the trusts of the will relating to the charities carried into execution under the direction of the Court, that proper persons might be appointed by the Court as

(1) 4 Br. C. C. 394. (2) 1 Ves. Sen. 320. (3) 7 Ir. Eq. R. 34.

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trustees to manage and conduct the charitable uses, and that the legacies, with interest, might be applied to the charitable purposes mentioned in the will; and that in case all or any of the testator's charitable intentions could not legally be fulfilled, such of the charitable funds as could not legally be applied to the purposes mentioned in the will might be applied to such other charitable purposes as the Court should appoint. By the first decree it was referred to the Master to inquire and report whether the legacies for charitable and other purposes in the pleadings mentioned could be carried into execution. A charge was filed in the Master's office by the two Roman Catholic clergymen of Mullingar, claiming to be entitled under the will to, *inter alia*, the £50, the £15, and the £20 a-year. The plaintiffs filed a discharge, submitting that the said sums appeared to be for superstitious uses. The Master, by his report, found that the legacies bequeathed for charitable purposes could be carried into effect, and that there was due upon foot of them to the Rev. Michael M'Cormack and the Rev. Edward Rourke, Roman Catholic clergymen of the town of Mullingar, the sum of £275, which included, *inter alia*, the above-mentioned sums of £50 and £15, and also £60, being three yearly gales of the £20 a-year to be paid by them to a third clergyman of the parish of Mullingar. The plaintiff excepted to this finding in the report, insisting that the said legacies were void and against law. The case was argued before Lord Manners (the Lord Chancellor) on the 3rd June, 1823, on report, exceptions, and merits, and having stood for judgment till the following 10th November, the exception was on that day overruled, and it was ordered that the executors should pay to the two clergymen, Michael M'Cormack and Edward Rourke, the sums mentioned in the report, including those of £15, £50, and £60, "to be applied by them to and for the *charitable* uses and purposes in the will of the said Judith Rush and in the Master's said report mentioned."

This decision involved the determination of two matters:—1, that the bequest of the £20 yearly to the third clergyman of the parish of Mullingar was charitable, notwithstanding the addition of the request "that he should offer a weekly mass for the repose of her soul and the benefit of her son." Upon this point it is

impossible to found a distinction between that case and the present, by reason of the use there of the word "request," as it plainly created a precatory trust; 2, it decided that the gift for "three solemn masses to be offered for the repose of her soul, on the day of her interment, in a month, and a twelve months' mind," at each of which there were if possible to be thirteen clergymen, "to perform the rites accustomed on those occasions," was also charitable.

It has been suggested that the sole question argued in that case was, not whether the bequests were charitable, but whether they were superstitious. This, however, is a mistake. The exception was that the legacies were void and against law; and even if not superstitious, at least one of them, viz. the bequest of the £20 a-year, would have been void and against law if not charitable. Further, as the matter appeared on the face of the report, the question would have been open, and one which the Lord Chancellor would have been bound to decide, without an exception expressly applicable to it; and it is impossible to conceive that the Master (Mr. Henn), the counsel (who included Mr. Saurin, the late Chief Baron Joy, and the late Lord Chief Justice, then Mr. Serjeant Lefroy), and the Lord Chancellor, should all have concurred in overlooking so obvious a question.

In consequence, however, of this suggestion, I have looked into the Registrar's book of the 3rd June, 1823, and it appears from it (which, personally, I should have had no difficulty in inferring without any such evidence), that the charitable character of the legacies was insisted upon and argued. Mr. Cruise, as counsel for the legatees, appears to have rested his argument upon the report of *The Attorney-General* v. *Fowler*, in 15th Vesey, 85. This report shows that that case involved the consideration of the charitable nature of the bequest and that the decision depended upon whether the benefit intended was public or private. It was an information and bill, the information being by the Attorney-General at the relation of ten out of twelve lessees in trust of a Protestant Dissenting chapel at Edmonton, and the bill being by those ten lessees as plaintiffs, against the two others, for an injunction to restrain the defendants from receiving the pew rents, and for the appointment of a receiver. The infor-

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mation represented the interest of the public, the bill, the private interest of those entitled to the pew rents. The late Sir Anthony Hart, in support of a motion for the injunction and for a receiver, is reported to have said that, "Every institution for the purpose of performing the offices of religion for the public gratuitously, is an institution of a public nature which the Court will protect. All those institutions subsist under the express toleration of the Legislature, that they shall be open; and that all persons who choose, shall be at liberty to attend gratuitously. In that respect this is a public institution, falling within the description of a charity, as understood in this Court." He then proceeded to distinguish the private right to the pew rents from the right of the public, and said that the rents were charged with reference to the accommodation of the subscribers, the pews and seats being hired by individuals, who were merely the tenants. Sir Samuel Romilly, on the other side, insisted that it could not be represented as a charity in any respect. "To the description of a charity in the enlarged sense of this Court, two qualities are attached: 1st, it must be a public benefit; 2ndly, it must be gratuitous. This is merely a private subscription for the convenience of the individual subscribers, partaking of the nature of a charity no more than a voluntary subscription for any other purpose: as a library, of which they were to have the common use." In giving judgment, Lord Eldon said, "This property is held by lease upon certain trusts, of such a nature that although they are for the benefit of a dissenting congregation, it cannot be denied that they are a congregation of persons whom the law will protect, and in whose favour a trust will be enforced, the nature of their worship being such as entitles them to protection; and there are abundant authorities that if this had been either a devise or a gift for this purpose, independent of the statute of Geo. 2, *it would constitute a charitable use*, and as such would be protected and enforced in this Court." The fact of this case having been cited before Lord Manners, abundantly proves that he not only considered whether the bequests were charitable, but that in doing so he had present to his mind the very matters which were discussed in *The Attorney-General* v. *Delaney* (1), and upon the

(1) Ir. R. 10 C. L. 104.

hearing of the present case. It is an entire mistake to suggest that the decision of this Court, in *The Attorney-General* v. *Delaney* (1), is to the slightest extent in conflict with the decree of Lord Manners. The latter was cited during the argument; in the judgments there is no suggestion of disapproval of it; the decision was, as I shall show, entirely consistent with it. The Attorney-General of the day (the late Lord Chief Justice May), from the commencement of his argument, rested upon the necessity, to a charitable bequest, of an intention to benefit the community at large, and insisted that "in this case the masses might be said in public or private." This was the reason which induced some of the members of the Court (of which I was one), to join in the desire for an affidavit, or supplemental answer, which is erroneously stated in the report to have been desired, 'to show the exact nature of a mass.' I say this because I, for one, was, and still am, of opinion, that the nature and character of the mass is a matter known to the Common Law, of which this Court must take judicial notice; but I was not clear that it was known to the law whether the mass under such a bequest as was there under consideration might be celebrated in private, instead of in public. But however this may be, the grounds of the decision were that the masses might be offered up in private, a matter of which there was no evidence in *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (2), and the assumption of the contrary of which was plainly the basis of the argument of the counsel for the legatees and of the judgment. I may add that, as a matter of fact, this assumption was right, because those acquainted with the rites of the Roman Catholic Church, know that the obligation to celebrate "*solemn* masses," at the times directed by the will, "with the *rites accustomed on those occasions*," could not be performed otherwise than by celebrating them in public.

For my own part I should be quite prepared without adding any reasons of my own, to act upon the decision in *The Commismissioners of Charitable Donations and Bequests* v. *Walsh* (2) in which I entirely concur, confining it, as there is no doubt it was intended to be confined, to masses to be celebrated in public. The question, however, has been elaborately argued; and on two

(1) Ir. R. 10 C. L. 104. (2) 7 Ir. Eq. R. 34.

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separate occasions I have been obliged to consider it with care, viz. twenty years since, when *The Attorney-General* v. *Delaney* (1) was decided, and again during the present argument. Further, I have given rise to some misunderstanding by confining my reasons in *The Attorney-General* v. *Delaney* (1) to those bearing on the actual question for decision there, viz. the nature of a bequest for masses not directed to be said in public, instead of also discussing at length the question we have here—a matter which, in the view of the Court — was not material in the *Attorney-General* v. *Delaney* (1), and the short allusion to which, in my judgment, was merely to prevent that judgment being understood in a sense more general than was intended. For these reasons I feel that it will be more satisfactory to the parties, to the higher Courts to which I assume this case will be brought by appeal, and to the profession generally, if I state my reasons in detail. In doing so I shall deal separately with two distinct matters: viz. 1, would the bequests have been charitable had the particular memorial not been mentioned? 2, the effect, if any, of the addition of such memorial.

It is settled (at least to such an extent as to bind this Court) that "charitable," in the section in question, bears the same meaning as the same word has been construed to bear in the 43rd Eliz. c. 4, Eng.; 10 Car. 1, c. 3, s. 1, Ir.; and 9 Geo. 2, c. 36. This was decided in *Attorney-General* v. *Bagot* (2), and followed in *Attorney-General* v. *Delany* (1); and the same construction was in *The Special Commissioners for Income Tax* v. *Pemsel* (3), applied to the same word as it occurs in the Income Tax Act.

Again, it is settled that the word "charitable" in the above-mentioned statutes of Elizabeth, Charles, and George, applies to all the purposes enumerated in the two first-mentioned Acts, and to all purposes "which by analogies are deemed to be within their spirit and intendment." Speaking of the English statute of Elizabeth, Lord Macnaghten says:—"It contained in the preamble a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the 'objects there

(1) Ir. R. 10 C. L. 104. (2) 13 Ir. C. L. R. 48. (3) [1891] App. Cas. 531.

enumerated,' as Lord Cranworth observes, 'are not to be taken as the only objects of charity, but are given as instances'" (1).

Lastly, it is settled that, in order to a trust being within this statute, it must be "in the nature of a general public use."

The Irish statute above referred to comprises, amongst its enumerated charities, "the building or maintaining in repair of any church," and "the maintenance of any minister or preacher of the Holy Word of God."

Now, first, as to the nature of the charitable act: There can I apprehend be no doubt that the first of those purposes was declared charitable because the church was the place proper for the celebration of divine service, and at common law the church was open to all the parishioners. Again, the exercise of the functions of a "minister" or "preacher of the Holy Word of God" contemplates the presence of a congregation at the services celebrated by him; and thus each instance mentioned in the statute, of a purpose charitable by reason of its piety, is one which involves religious services, at which a section of the public are entitled to be present, and whose presence at such services the law deems to be a benefit to them.

Next, as regards the character of the religion:—It is to be observed that as in consequence of the Protestant Episcopalian religion being the State Church in the reigns of Elizabeth and Charles I., and, also, of the then existing laws in relation to the exercise of other religions, it is probable that the only trusts which, by reason of their object being the advancement of religion, would have been recognised as charitable at the time of the statutes in question, were trusts for the advancement of that particular religion. Nevertheless, it is clear that the religious services, the public celebration of which involved the public benefit contemplated by the statute, must now be taken to include the religious services of, at least, any denomination of Christians. I say this because when from time to time, the passing of the various Toleration Acts rendered lawful the exercise of religions other than that of the Established Church, trusts for the advancement of the Roman Catholic religion, of the religions of Protestant Dissenters, and even of that of the Jews, were held charitable within the meaning of the statute.

(1) *Commissioners of Income Tax* v. *Pemsel* ([1891] App. Cas. 531).

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In *Pemsel's Case* (1) to which I have already referred, a trust for maintaining the missionary establishments among heathen nations of the Moravian Church was held by the House of Lords to be charitable, so as to exempt the annual income of the trust from income tax.

It is possible that at the time of the statutes of Elizabeth and Charles, the law may have recognised some other element of public benefit as being involved in religious purposes. In a country in which an Established Church exists, the law recognises the essential doctrines of that Church as being true; and when, according to those doctrines, benefit, either spiritual or temporal, results to the general body of the faithful, from the offering up of prayers or the celebration of religious services, I can quite understand it being held that such spiritual or temporal benefit would be recognised by the law as such a public benefit as would bring within the statute a trust to promote the services and prayers of the Established Church, even if such prayers and such services were capable of being offered up in private. But the case of a religion, the exercise of which is lawful, but which is not established by law, such, *e.g.* as the Roman Catholic religion, differs from that last mentioned in this, that its doctrines, although capable of being recognised by the law as those which the members of that particular faith believe to be true, cannot be recognised, as can the doctrines of an Established Church, as being in fact true; and therefore the argument that the services of such a religion, offered up otherwise than in public, are a benefit to the public, lacks one of the essential elements which is present in the case of a similar trust as to an established religion; and therefore the conclusion that there may be, in such a trust, a public benefit recognisable by the law, fails. This was the ground of the decision in the *Attorney-General* v. *Delaney* (2).

Excluding this element, what remains of public benefit in a trust to procure religious services of a religion not of the Established Church, other than the advancement of that religion by the public celebration of its religious services? *Cocks* v. *Manners* (3), a case in reference to the prayers of a Roman Catholic community, decides that there is none; and that case was followed

(1) [1891] App. Cas. 531. (2) Ir. R. 10 C. L. 104. (3) L. R. 12 Eq. 514.

in this Court, and, as I still think, rightly followed, in *The Attorney-General* v. *Delaney* (1). But however this may be, one thing, I hold, is clear, that the decisions that extend the charitable purposes, within the statute, to trusts for the advancement of a religion other than that of an Established Church, involved this: that a trust for the public celebration, in a public church, of the one sacrifice which is known to that religion, must be recognised as being charitable within the statute. I should so hold, were the question devoid of all authority. But authority is not wanting. The principles of the decisions of *Straus* v. *Goldsmid* (2); *Commissioners of Income Tax* v. *Pemsel* (3), and *Farquhar* v. *Darling* (4) are directly applicable.

It has been argued for the Crown that, as the obligation imposed by the bequest may be discharged by the celebration of masses which the priest might otherwise have been obliged to celebrate, no additional masses, and consequently it is said no additional benefit to the public, is secured by the bequest. This argument treats a charitable gift as a purchase for the public of benefits to the public. This is not the true doctrine applicable to charity. The necessary public benefit is sought in the *character* of the purpose according to the intention of the donor. If that intention be the performance of acts which *tend* to benefit the public, the Court *never* proceeds to inquire whether the result *must* be benefit which it is *certain* would not otherwise accrue to it. Thus, a rector of an Established Church is under an obligation, enforceable by the Ecclesiastical Courts of the country, to perform the duties of his cure: still a gift to the person for the time being filling the office is charitable, although it does not impose upon him any new obligation. Such a gift tends to the advancement of religion, because it contributes to the support of its minister; and the Court, in such a case, does not inquire into the *quantum* of his former stipend, or the necessity for its increase. Similarly, a gift to the Roman Catholic clergyman for the time being of a particular church or district is charitable: *Thornber* v. *Wilson* (5); because it is for the benefit of the office of a clergyman, whose

(1) Ir. R. 10 C. L. 104.
(2) 8 Sim. 614.
(3) [1891] App. Cas. 531.
(4) [1896] 1 Ch. Div. 50.
(5) 3 Drew. 245.

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function it is to publicly perform Divine service. By analogy, a gift to a clergyman because he publicly performs Divine service ought to be deemed charitable, whether the donee was or was not previously subject to a moral, or even to a legal, obligation, to perform it.

But further, this bequest imposes an additional obligation and one recognised and capable of being enforced, by our law. A Court of Equity, if it thinks fit, can by its order paying out the legacy require to be furnished, within a specified time, with proof to its satisfaction of the act done, and direct that in default the sum shall be brought back. No doubt the Court usually does not adopt this course. In the absence of special circumstances, it prefers to trust the person whom the testator has trusted; and consequently, as in *The Commissioners of Charitable Donations* v. *Walsh* (1), it pays out the money to him, with a direction for its due application. But by so doing, it recognises and enforces the obligation. The mode of so enforcing it which it may think fit to adopt in any particular case is immaterial. Any obligations which may previously have been imposed upon the priest by his ordination vow, by the directions of his Religious Superior, or otherwise, are of a different character. They are not recognised by, and are incapable of being enforced by, our law; and consequently the effect of the bequests in question here is to impose an obligation, enforceable by our Courts of Civil Judicature, that there shall be celebrated in public a certain number of religious services, which it is absolutely uncertain would otherwise have been celebrated, either at all or in public, and which it is certain there would not have been any legal obligation to celebrate.

For these reasons, I am of opinion that if these bequests had not contained the direction that the masses should be offered for the repose of the specified souls, they would have been charitable.

It remains to consider the effect upon the character of the bequests, of the masses contemplated by them being, not masses without any special memorial, but masses for the repose of the souls of specified persons. In doing so, I must assume that, but for the addition of this memorial, the purpose would have been charitable. If it would not, this question would not arise. As to it, the points

(1) 7 Ir. Eq. R. 34.

principally insisted upon for the Crown were three, viz.: 1, that the motive of the gift was a personal, or, as it was called during the argument, a selfish one; 2, that the obligation imposed upon the legatee was to procure, or attempt to procure, a personal benefit for the testator; 3, that the performance of the obligation involved intention, and that therefore the Court could not determine whether the purpose of the testator had been effectuated.

As to the motive of the testator in making the bequest distinguished, as it has been during the argument, from the purpose to which he directed the gift to be applied, I cannot express my views better than by adopting the words of the Master of the Rolls in *Perry* v. *Tuomey* (1): "If the object be itself charitable, the state of mind which influenced the testator to give the legacy is immaterial. This is plain from the context; especially from the words, 'for the education of poor children,' and 'to be applied in support of any charitable institution.' There is no room for question on this subject. A testator's motive may have been quite other than that of sincere charity. It may have been simple ostentation, self glorification, the desire to gain posthumous popularity, the wish to disappoint expectant relatives, the hope of benefit to his own immortal soul. Motive is wholly unimportant. The legislative exemption from duty is intended to benefit the charities, and not to encourage virtuous feelings or charitable inclinations."

These observations have reference to the words "charitable," as used in the 5 & 6 Vict. c. 82, s. 38. Expressions to the same effect, however, in reference to charities within the statute of Elizabeth, are to be found in the judgment of Kindersley, V.-C., in *Hoare* v. *Osborne* (2). The question there arose in reference to a gift for the erection of an ornamental window, which the testatrix directed her trustees to place in Hungerton Church, in memory of her mother. "It is contended," says the Vice-Chancellor, "that the testatrix, in creating this trust, had no idea of making a charitable gift, her only object being to do honour to the memory of her mother. But the Court cannot inquire into the motives of the donor, if the gift be in its nature a charity." The same doctrine was laid down, nearly a century and a-half ago, by Lord Hardwicke in *Durour* v. *Motteux* (3).

(1) 21 L. R. Ir. 480. (2) L. R. 1 Eq. 585. (3) 1 Ves. Sen. 320.

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To those judgments I shall add but one observation, viz. my full concurrence in the argument which was so forcibly relied on by Mr. Carton, that having regard to the reference to piety in the statute of Charles, and the numerous authorities in which purposes defined simply as "pious" or "religious" have been for that reason held charitable, it would be strange that a bequest, which would have been charitable had its motive been ostentation or vanity, should be deemed to lose that character, solely because its motive was a belief in the efficacy of prayers for the dead; a belief not only absolutely lawful, but one of the essential doctrines of a religion the advancement of which the law deems to be charitable.

The second point was the purpose of the bequest. What was the purpose here? Whatever it was, it necessarily involved the public celebration of masses. Now, assuming that that purpose would have been charitable, had not the particular intention been mentioned, how can the addition of the particular intention prevent the same identical act from having the character which it otherwise would have had? Every celebration of mass involves intention. If there be no particular memorial, it is offered up for all the faithful, living and dead; but it is not because of that intention being involved that it is deemed charitable, but solely because it is a public religious service. If there be any denomination of Christians whose service does not involve intention at all, the public celebration of that service would be equally recognised as charitable. How can the charitable character which the law recognises, be affected by an alteration of that which is immaterial to that character? Even if the addition of the particular memorial caused an alteration in the character of the service, according to the doctrines of the particular faith, such additional memorial would be immaterial, provided that notwithstanding its addition the service remained a religious one and was to be celebrated in public. That which stamps the charitable character is not the nature of the particular service, but the fact that it is a public religious one. But further, it is altogether a mistake to assume that the addition of the particular memorial causes any such alteration: the contrary is proved by the affidavit which, at the request of the Attorney-General, and with the consent of Mr. Carton, we permitted to be read in evidence for the Crown.

A passage in the judgment of Sir Thomas Plumer in *Mellick* v. *President and Guardians of the Asylum* (1), has been relied on for the Crown. The Master of the Rolls there describes "charitable purposes," within the statute of Elizabeth, as "not operating in any manner to the benefit of" the donor. The real question there was whether a bequest of £2000, out of real estate to erect a monument in a church to the testator's memory within a year after his death, failed by reason of the rector having refused to allow the monument to be erected within the year. The Master of the Rolls, in the passage cited, which is one of many similar passages which occur in the books, distinguishes, and, as I think, rightly, between the public benefit contemplated by the statute and a private benefit. But, in my opinion, the spiritual benefit which, according to the religious belief of a testator not belonging to an Established Church, may result to his soul after death, can no more be deemed to be a private benefit so as to prevent the gift being charitable, than can such a benefit, which according to the same belief results to all the faithful, be deemed a public benefit so as to render it charitable. The benefits, be they private or public, spoken of in this connection, must be such as the law itself can know and determine to be such. How, without exceeding its province, by entering on the consideration of the truth of the doctrines of the Roman Catholic Church can the Court determine that the soul of a deceased person can be benefited by the celebration of masses? In this view the actual *decision* in *The Attorney-General* v. *Delaney* (2) affords, by analogy, the strongest argument against the direction for the particular memorial having any bearing upon the charitable character of the gift.

But further this matter also seems closed by authority. *Durour* v. *Motteux* (3), to which I have already referred as to motive, is also in point here. There the remainder of the testator's lands were devised to provide a fund for a perpetual annuity of £10 a-year to a minister to preach a sermon once a year to his memory, to keep his tombstone in repair, and to keep legible the inscription thereon, and on the stone against the wall reciting the gift. The Lord Chancellor said, "This perpetual annuity to the minister is a charitable use, which is not prevented by the addition of the annual

(1) Jacob, 180. (2) Ir. R. 10 C. L. 104. (3) 1 Ves. Sen. 320.

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sermon; . . . and the rest is not only a vain concomitant of the charitable bequest, but a circumstance attending the general execution thereof." This, it is to be remembered, is the case referred to by Fitz Gerald, B. as a typical instance of a gift merely charitable. There was also a particular memorial in *The Commissioners of Charitable Donations* v. *Walsh* (1).

As to the third point, wherever a trust or purpose is annexed to a gift by will, it is the duty of a Court of Equity, in administering the assets, to see to its execution; and if it be one not capable of being enforced, then the legacy fails altogether, by reason of the failure of the purpose; and, as I have already pointed out, in that event there would be no subject-matter upon which duty would be payable. Further, this Court, in *The Attorney-General* v. *Delaney* (2) decided that legacy duty was payable upon such a bequest, and by so doing decided that the bequest was good.

Again, as intention is involved in the celebration of every mass, whether it be or be not offered with a particular memorial, or be or be not directed to be offered with such memorial, if the Attorney-General's argument be sound, every gift for masses would necessarily fail, whereas the practice of the Court of Chancery, since the decision of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (1), has uniformly been to give effect to them, and to pay to the legatees the sums bequeathed for masses. In saying that such bequests would fail, I mean, not merely that they would cease to be charitable, but that they would fail altogether; and no question has been raised, that I am aware of, since 1823, that a bequest to a particular individual of a sum of money for masses is altogether void. What is the argument of the Attorney-General, upon which this revolution of practice is to be based? "That the Court of Chancery cannot determine whether an act involving intention has or has not been performed." This is a strange doctrine, when the majority of human acts, upon the effect of which the law, in Courts of either criminal or civil judicature, has to pronounce, involve intention. I have already pointed out how a Court of Equity can and does see, to the execution of purposes involving intention.

For these reasons, I am of opinion that the direction to make

(1) 7 Ir. Eq. R. 34. (2) Ir. R. 10 C. L. 104.

the particular memorial does not affect the question; that consequently the bequests are charitable; and, applying the rule laid down by Fitz Gerald, B., in *The Attorney-General* v. *Bagot* (1), "*merely*" charitable. They are, therefore, exempt from legacy duty, under the Statute 5 & 6 Vict. c. 82, s. 38. In my opinion, the information should be dismissed with costs.

ANDREWS, J.:—

Although agreeing, as I do, with the exhaustive judgment of the Lord Chief Baron, it might be sufficient for me to say no more than that I concur in it; still, having regard to the position in which the question in this case stands, I desire to state briefly the substance of the reasons which have led me to the conclusion that the testator's bequests for masses to be celebrated publicly, in specified Roman Catholic churches in Ireland, for the repose of the souls of himself and his wife, are valid charitable bequests, and, as such, exempt from legacy duty, under the 38th section of the 5 & 6 Vict. c. 82.

It is not disputed that it must now be taken that in Ireland bequests for masses for the souls of deceased persons are not illegal. Since the undisturbed decisions in the cases of *The Commissioners of Charitable Donations and Bequests* v. *Walsh* (2) and *Read* v. *Hodgens* (3) (to which alone I need refer), it has become settled law in Ireland that such bequests are not invalid. It is also well settled that a religious purpose may be a good charitable purpose, and I agree in holding, as in my opinion the authorities show, that if the religious purpose be of a nature which in the judgment of the Court confers in its execution a benefit on the public, or a denomination of the public, by tending to their religious edification, it is a valid "charitable purpose," within the meaning of those words in the section in question, construed as those words judicially have been. Now the evidence which has been entered in this case shows that every mass, whether accompanied or not by a memorial for the soul of any individual is, according to the Roman Catholic faith, a real sacrifice offered to God by the priest in the name of the Church as a part of its

(1) 13 Ir. C. L. R. 48. (2) 7 Ir. Eq. R. 34. (3) 7 Ir. Eq. R. 17.

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ATTY.-GEN. v. HALL.

Andrews, J.

religious service, in order, amongst other pious purposes, to bring down His blessings upon all the faithful living and dead, and that the congregation is bound to follow the priest in the celebration of the mass, and concur in the general intention of it. Upon this evidence the Court, as a Court, can—and according to the authorities ought, in my opinion, to determine that the public celebration of the mass confers a public benefit by the religious edification of those members of the Roman Catholic Church who attend it; while the Court cannot determine that the celebration of the mass in private confers a public benefit, although, according to the faith of the Roman Catholic Church, it may, and, according to the belief of that Church, it does confer such benefit.

I regard this as the distinguishing difference between the present case and that of *The Attorney-General* v. *Delaney* (1), and the existence of this difference is what, in my opinion, makes the bequests in the present case charitable. But it is objected that the testator's real motive and purpose, in making the bequests under consideration, were not to confer a public benefit, but to obtain personal advantages. Assuming this to be so, I think it a sufficient answer to the objection that the Court looks to the public benefit, and not to the private motive or purpose. If the mode of obtaining the expected personal advantages necessarily involves the conferring of the public benefit, the charitable character which conferring a public benefit gives to the bequest cannot be destroyed by the motive which induced the testator to make it. There is ample authority for this, but it is enough to instance the cases of the memorial sermon, *Durour* v. *Motteux* (2), and the memorial window, *Hoare* v. *Osborne* (3). Neither is it a valid objection that it is possible that the purpose of these bequests can be complied with without saying any more masses than would otherwise be said, for it is not the quantities of the service which the Court looks to, but its character and tendency, and besides the testator has, by his bequests, created *legal* obligations in relation to saying the masses he has provided for, which otherwise would not have existed. Lastly, with respect to the argument that the Court cannot give effect to the purpose of the bequests because of its inability

(1) Ir. R. 10 C. L. 104. (2) 1 Ves. Sen. 320. (3) L. R. 1 Eq. 585.

to ascertain whether a mass, in the celebration of which the name is not mentioned of the individual for the repose of whose soul it is said, is a memorial mass, the objection fails, in fact, for the celebrant can, if necessary, prove that the mass was a memorial one; but as it lies at the foundation of the information in this case that the bequests upon which the Crown asks for duty, are valid bequests the objection is not open, for if tenable it would go to the validity of the bequests, and actually defeat the prayer of the information. It has not been suggested, and there is no evidence that the gifts in question are in any respect at variance with the policy of the Emancipation Act (10 Geo. 4, c. 7) and, in my opinion, they are valid charitable legacies, and being so are, according to the decision of this Court in the *Attorney-General* v. *Bagot* (1), "merely charitable," within the meaning of the 38th section of the 5th and 6th Vict. c. 82, and therefore are not liable to legacy duty.

I wish to add, with reference to the case of *Kehoe* v. *Wilson* (2), in which the Vice-Chancellor gave a decision which is opposed to our conclusion in this case, that, while entertaining the highest respect for the opinion of so eminent a judge, I do not feel bound to follow that decision when the report of it does not disclose the grounds it was based upon, and when I find it at variance with Lord Manners' decision in *Walsh's Case* (3), with the opinion of the Lord Chief Baron, as expressed in his judgment in *The Attorney-General* v. *Delaney* (4), and with the opinion of the Master of the Rolls in the recent case of *Perry* v. *Tuomey* (5), as well as with the unanimous opinion of this Court in the present case, which opinion is, as I think, in accordance with the current of authority affecting this question.

MURPHY, J., concurred.

Solicitor for the informant: *The Solicitor for the Inland Revenue.*
Solicitor for the defendants: *Daniel Purcell.*

J. P. B.

(1) 13 Ir. C. L. R. 48.
(2) 7 L. R. Ir. 10.
(3) 7 Ir. Eq. R. 34.
(4) Ir. R. 10 C. L. 104.
(5) 21 L. R. Ir. 480.

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REG. (MORGAN) *v.* JUSTICES OF CO. TYRONE (1).

Jan. 30. Feb. 1.

Licensing law—Application for certificate for spirit grocer's license—Absence of objection by police—Objection by other parties—Ground of objection disclosed by the applicant's own statement—Authority of Justices to ascertain the fulfilment of all conditions necessary to the exercise of jurisdiction—Power of adjournment—Beerhouses (Ireland) Act, 1864 (27 & 28 *Vict. c.* 35), *ss.* 3, 4, 5—*Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 14.

M. applied on notice to the Justices at Petty Sessions for a certificate for a spirit grocer's license, and, when the case was called, came forward and was examined by his solicitor. Then another solicitor present applied on behalf of two inhabitants of the district for leave, and was allowed, to cross-examine the applicant. There was no objection on the part of the police. On the applicant's own statement, and in answer to a question from the bench, as well as on such cross-examination, it appeared that the premises were unsuitable. The bench refused to grant the certificate on this ground:—

Held, that the only legitimate objector being the officer of police, and there being no objection on his part before the Court, the Justices were bound to grant the certificate.

Reg. (*Marshall*) v. *Justices of Tyrone* ([1896] 2 Ir. R. 15) followed.

Upon any such application being made, and independently of and prior to considering any objections, the Justices are entitled to ascertain that the application is properly before them, and the conditions essential to their jurisdiction fulfilled, *i.e.* that the applicant is a person of full age, residing within the Petty Sessions District, and that the prescribed notice has been served within the prescribed time; and if, from the applicant's own statement, when called, any valid ground of disqualification is disclosed, the Justices have power to call the attention of the officer of police thereto (if he be not already prepared to object), and to adjourn the hearing in order to allow him to make objection accordingly.

MANDAMUS. At Petty Sessions held at Cookstown on the 27th September, 1895, William Morgan, the present applicant, had applied for the necessary certificate (under 27 & 28 Vict. c. 35; 35 & 36 Vict. c. 94, s. 82; and 37 & 38 Vict. c. 69, s. 9) to enable him to obtain a spirit grocer's license. Due notice had been

(1) Before O'BRIEN, JOHNSON, HOLMES, and GIBSON, JJ.

served on the police stating his intention to do so, and stating the situation of the premises in respect of which the license was sought. The case came on for hearing before a bench of ten Justices, when the applicant was produced by his solicitor, Mr. Venables, to prove the suitability of his premises, and, in the course of his examination, admitted to one of the magistrates on the bench that there was internal communication between the premises for which he sought the license and a house occupied by a neighbouring grocer who was in fact in possession and occupation of the whole of the house for which the license was sought except the shop, and that the door leading into the shop was only closed by means of some sort of a press which was placed there a few days before the hearing of the application and within that week. It further appeared on the evidence that Morgan, who resided a few doors from the proposed licensed shop, which had only been opened as a grocery three weeks before, had placed his daughter there while he himself continued his occupation as a tailor in the house in which he resided, and only supervised the business carried on by his daughter in the new shop. During the progress of the case, Mr. Malone, solicitor, asked leave to appear and oppose on behalf of a number of the inhabitants, and the Bench, by a majority, held that he was entitled to be heard, and allowed him to cross-examine the applicant after he had been put forward and had given his evidence to Mr. Venables in support of the application; but no evidence was offered or given by Mr. Malone or anyone else in opposition to the application, and it was solely on the evidence of the applicant himself as to the internal communication that the Bench decided that the premises were unsuitable. The District Inspector of Police was not present, and the Head Constable who represented him stated that he had been directed to offer no opposition. The Justices, or a majority of the Justices, considered that the constable was influenced by the approach of an election for a Petty Session clerkship for which he was a candidate, and that in view of the applicant's own statement they were not bound to grant, and refused to grant, the certificate on the ground of the unsuitability of the premises.

The above statement is taken from the account of what occurred given by the Justices showing cause, and, though directly

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controverted in most particulars by the applicant in his affidavits, may be accepted for the purposes of this report. The inhabitants for whom Mr. Malone appeared were two rival publicans. The applicant's first affidavit on which the conditional order was obtained contained no reference to the evidence given as to the internal communication between the shop and the neighbouring grocery; and his affidavit in reply alleged that this evidence was obtained on his cross-examination by Mr. Malone. There was some evidence that the applicant had canvassed at least two of the Justices, in one case unsuccessfully.

Counsel for the applicant, Morgan, now moved to make absolute the conditional order obtained for writs of *certiorari*, to quash the order so made, and of *mandamus*, directing the Justices to enter continuances and to rehear and determine the matter.

O'Shaughnessy, Q.C. (*Denis Henry*, with him), for the applicant.

On such an application as the present, the functions of the Justices are governed wholly by sections 4 and 5 of the Beerhouses (Ireland) Act, 1864, by which their authority is limited to a consideration merely of objections made by the police, as to character or the suitability of the premises. No other person has any right of objection. In the absence of any objection by the police, the Justices are bound to give the certificate: *Reg.* (*Marshall*) v. *Justices County Tyrone* (1). The giving of it is, in such case, a purely formal matter. Under the earlier law no such certificate was needed at all; any grocer could obtain a spirit grocer's license directly from the Excise; and, in the provision contained in the Act of 1864, the Legislature considered that the police would sufficiently safeguard the interests of the public; the certificate of the Justices was not so much intended to be any affirmative declaration on their part of the applicant's good character or the suitability of his premises, as, what in substance and reality it is, a negation of the existence of any legal objection by the officer of police on either of these grounds.

J. H. Campbell, Q.C., and *W. H. Browne*, for the Justices:—

We must admit that no one except the police can make any

(1) [1896] 2 Ir. R. 15.

objection to the application, or intervene, except perhaps, as is sometimes allowed on such applications, as *amicus curiæ*; and that therefore Mr. Malone's action cannot be supported. But, apart from this, and without questioning the decision in *Marshall's Case* (1), which was, on the facts, a decision that, where the applicant had made a *prima facie* case, the Justices, in the absence of any legitimate objection, were bound to grant the certificate, we submit that, when the case is called on for hearing, and before the time has arrived at all for making objection thereto, the applicant must make an "application"—must make out a *prima facie* case; and that the Justices are entitled to see the applicant, and to ascertain whether or not the application is made *bona fide*, to ascertain, for instance, that the applicant is not a child or an idiot, that he is the owner of premises within the district where grocery business is actually carried on—and that, where the applicant fails to satisfy the Bench on these matters, or where, as was the case here, and as is the usual and established practice throughout the country, the applicant presents himself in Court and is called and examined by his solicitor, and, on such examination, shows, on his own statement, that the application is informal or untenable, the Justices are not bound to proceed further, and (the applicant having thus, so to speak, non-suited himself) no occasion for any objection arises. [Counsel also contended, in addition to the points upon which the case is reported, that the applicant had disentitled himself to relief, on the ground of non-disclosure of material facts in the affidavit on which the conditional order was obtained—citing *M'Donogh* v. *Davies* (2), and *Marshall's Case* (3)—and on the ground of his alleged canvass of the Justices.]

Denis Henry, in reply:—

The Justices are entitled to inquire whether the applicant resides within the Petty Sessions District, and, perhaps, to call him in order to ascertain this; but there is nothing to require the applicant to be present in Court, or to make out any *prima facie* case, as has been now suggested; the application is made in

(1) [1896] 2 Ir. R. 15. (2) Ir. R. 9 C. L. 300. (3) 32 L. R. Ir. 201.

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writing, and on notice; and the only question for the Justices is whether any objection is made by the officer of police.

[The following cases were also referred to during the argument, *Reg.* v. *Justices Antrim* (1), *Reg.* (*Murphy*) v. *Justices Cork* (2)].

Feb. 1.

O'BRIEN, J.:—

This case has been argued on several grounds, with some of which the members of the Court do not consider it necessary to deal at any length. One of these is the conduct of the applicant, affected partly by his own action, partly by the action of one of the Justices who appears to have been active in his favour and to have decided for him. Independently of what we cannot but know of the circumstances that attend applications of this kind and the influences that people seek to use, and without giving any countenance to corrupt conduct of any magistrate departing from the dignity of his position, I do not, for myself, consider that sufficient ground has been here shown for holding that the applicant's right to maintain this motion has been substantially affected by his conduct and alleged interference with the magistrates in order to obtain a decision in his favour, there being no conclusive proof before the Court that he intended improperly to influence the tribunal and to affect the result of the inquiry before them. If that were so, we should have a different matter for consideration.

A great deal of controversy has taken place as to what occurred at the hearing of the application at the sessions; but the conclusion which I draw from the balance of the evidence is that the applicant did not present himself for examination as the result of any invitation from the Bench, or on account of any objection, but came forward of himself, in the ordinary manner, as it is said, to subject himself to any questions that the magistrates might wish to put to him. I fully concur in what has fallen from the other members of the Court during the argument, that, in regard to all matters of fact that lay at the foundation of the magistrate's juris-

(1) [1895] 2 Ir. R. 603. (2) [1895] 2 Ir. R. 104.

diction—the question whether notice had been served on the Clerk of the Peace, and notice on the police, the fact of the applicant's residence within the district, and that he was a person of full age —the magistrates had full power to consider these matters, and to inquire into them before proceeding further; but this is not the matter here in question. When they have ascertained that they possess jurisdiction to entertain the application, then arises the stage of the proceedings at which it is their duty to inquire into the objections that are raised, and that duty is confined to inquiring into the matters mentioned in the statute. In reference to *Marshall's Case* (1), I think that it was still open to Mr. Campbell to contend here that this was not a decision upon the present matter, for although the expression of the opinion of the Court did reach to the question now before us, the circumstances of that case were entirely different. It was not the case of a person presenting himself for examination, and in his evidence raising an objection to his own application; it was a case where the Justices themselves became the objectors, and treated as still subsisting an objection made at a former hearing which the Court of Appeal had declared to be illegal. The judgment of the Court in that case, however, would be applicable to the present question, namely, whether the Bench had authority to proceed to consider the question of suitability in the absence of an objection by the police. I see no reason for departing from the judgment which I pronounced on that occasion. The whole question must be viewed with regard to the origin of this jurisdiction of the Justices in reference to spirit grocers' licenses. It is derived from a quite different source from their jurisdiction in reference to publicans' licenses. A power existed in the Excise, without the right of anyone to interfere in its use, to grant these licenses, and the intention of the Legislature is manifest in this that no affirmative power, to grant the certificate if they think fit, is given to the Justices, but a negative power merely, that, if "satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate." As has been said several times during the argument, their authority to arrive at a decision refusing the certificate is

(1) [1896] 2 Ir. R. 15.

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wholly based on the 5th section of the Act (27 & 28 Vict. c. 35); their refusal must be founded upon a judgment formed in their minds upon the validity of an objection made under that section; and there appears to me to be no answer to this argument. The ordinary man who has had no occasion to make repeated reference to these matters might suggest that it was still intended that there should be a preliminary investigation in the first instance, and that, as an additional precaution, and to prevent surprise or perversion of the law through influence or indifference, it was provided that notice should be given to the police and that they should be authorised to object. But that, as I take it, is not the true account at all. The true account is that certain directions and authority are given to the police, with whom it lies to provide the only kind of evidence upon which the magistrates can act. In all the cases in which the principles underlying the decisions in *Clitheroe's Case* (1) and *Cox's Case* (2) have been discussed, remarks have been repeatedly made on the two distinct influences that may be traced throughout these Acts of Parliament, the wish, on the one hand, to check the evils that might arise from the want of a sufficient control over the issue of licenses, and on the other, the influence no less strong and no less distinct in favour of the revenue and directed against throwing too many difficulties in the way of so great a source of taxation; and it seems to me that in this spirit-grocers' code the latter influence still prevailed even when the issuing of licenses was taken out of the uncontrolled power of the Excise authorities.

JOHNSON, J.:—

I agree. Two conditions are essential to the jurisdiction of the Justices to entertain the application. The applicant must (*a*) reside within the district of the petty sessions in which the certificate is to be signed (35 & 36 Vict. c. 94, s. 82); and (*b*) have given the prescribed notice within the prescribed time (27 & 28 Vict. c. 35, s. 4). The Justices to whom the application is made should, whether or not there is any objection before them, satisfy themselves that their jurisdiction exists by the fulfilment of these conditions. No person is authorised to object to the issuing

(1) Ir. R. 11 C. L. 412. (2) 16 L. R. Ir. 424.

of the certificate to the applicant except the police-officer specified by the statute (27 & 28 Vict. c. 35, s. 5); and the Justices cannot entertain or decide any other objection: but I agree with my brother Gibson that even where there is no objection, yet, if on the inquiry into the fulfilment of the conditions on which the jurisdiction of the Justices is founded or otherwise, facts transpire which, if the police-officer had been acquainted with them, would have justified a police objection, the Justices have authority to adjourn the application and direct their clerk to bring the circumstances under the notice of the police-officer, who presumably will discharge his duty. The Justices have not, in my opinion, any jurisdiction to originate an objection themselves, or hear any person objecting except the police-officer, to whom the Legislature has in this case entrusted the duty of objecting.

HOLMES, J.:—

In this case, as far as I can see, there is no doubt that the applicant had premises in which the business of a spirit-grocer could be carried on. That being so, the question that came before the Justices was whether they should give the certificate mentioned in the Act of Parliament. They were bound to give it unless there was an objection before them. If there was such an objection they could inquire into the matter, and if they thought right refuse to grant the certificate. In the present case there was no objection, and therefore it seems to me that the magistrates were not justified in making the order sought to be quashed.

GIBSON, J.:—

The existence of a qualified applicant in possession of premises within the district is a condition precedent to jurisdiction, and the Justices are entitled to satisfy themselves that this condition is fulfilled. I think it is settled by *Marshall's Case* (1) in this Court that the only *legitimus contradictor* is the officer of police: but I entirely concur in the remark of Mr. Justice Johnson that if the applicant is examined—and I think that the Justices are

(1) [1896] 2 Ir. R. 15.

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entitled to insist on his being called—and if it appears from his evidence that there is ground of objection, it is competent for the Bench to call the attention of the police to the matter, and to adjourn the application in order that an objection may be made and considered at a subsequent hearing.

Solicitor for applicant; *W. J. Venables.*
Solicitor for the Justices: *S. Malone.*

A. E. R. J.

NAGLE *v.* CAMPBELL (1).

Appeal. 1895.
Nov. 18.
Dec. 10, 11.

Parliament—Franchise—Registration—Freeman—Divided Borough—Change of Residence—Notice of Claim.

It is not necessary for a freeman who, during the qualifying period, has changed his place of abode from a residence within one division of a borough to another within the borough or the seven miles limit to serve a fresh notice of claim.

In the case of a divided borough, if the Revising Barrister find that the place of abode of a freeman is wrongly stated on the list, he is bound, on proof of the true place of abode, and that the same is within the qualifying radius, in the case of a duly qualified freeman, to correct the place of abode as stated in the list, and to assign the freeman to the right division for the purpose of voting.

APPEAL by the objector against the decision of Mr. Teeling, Q.C., one of the Revising Barristers for the city of Dublin, declaring that several persons whose names appeared on the Freemen List for the said city, and on whom the appellant had served notices of objection were entitled to the franchise. The facts appear from the case stated, which was as follows:—

"At the recent Parliamentary Revision for the borough of Dublin, the names of the several persons, set out in the Schedule A hereunto annexed, appeared on the register of Freemen of the borough of Dublin for the respective Parliamentary divisions mentioned in the said schedule, and as residing within the respec-

(1) Before SIR P. O'BRIEN, L.C.J., PALLES, C.B., and FITZ GIBBON, BARRY, and WALKER, L.JJ.

tive wards or districts of the said Parliamentary divisions and at the addresses in the said wards or districts in the said schedule mentioned.

2. Notices of objection were duly served on all such persons on the ground that they did not reside during the qualifying period at the addresses indicated on the register, or elsewhere in the particular Parliamentary division in which such addresses were situate.

3. It was proved in each of the said cases and I find as a fact, that none of the said persons resided on the 20th July, 1895, the last day of the qualifying period or at any other time during the qualifying period at the addresses indicated, or elsewhere in the Parliamentary divisions respectively in which such addresses are situated.

4. It was also proved, and I find as a fact, that of the said several persons who did not so reside on the 20th July, 1895, or at any other time during the qualifying period at the addresses indicated, or elsewhere in the particular Parliamentary division, the following persons never resided at the addresses indicated in the said schedule in the Parliamentary divisions for which they had been registered as resident freemen, viz.:—

Alfred Barber, Augustine B. Barber, Osborne E. Barber, The Rev. James Alexander Carr, Robert William Montgomery, Robert John Montgomery, James T. Hurford and Francis William Bashford.

5. I expunged the names of the said several persons included in the said Schedule A, from the List of Freemen for the respective Parliamentary divisions in which they had been so proved to be non-resident. None of the said persons so expunged had served any claim to be registered in any other Parliamentary division.

6. It was contended by Mr. Deverill and Mr. Toomey, on the part of the said several persons so expunged, that although non-resident in the particular Parliamentary division for which they appeared on the register, yet if they proved that they were resident on the 20th July, 1895, and during the rest of the qualifying period in some other Parliamentary division or on outside bounds, they would be entitled without having served a fresh claim to be inserted on the List of Freemen for the particular Parliamentary

Appeal. 1895. NAGLE v. CAMPBELL.

division in which they should so have proved they resided during the qualifying period, or in the case of those residing on outside bounds that they would be entitled to be transferred without being submitted to the process of allotment prescribed by sub-sect. 2, of section 14 of the Redistribution of Seats Act, 1885, to the List of outside bounds Freemen for the particular Parliamentary division for which they had been originally registered as resident in such Parliamentary division.

7. This contention was founded on the concluding words of the 55th section of the Parliamentary Voters (Ireland) Act, 1850, 13 & 14 Vict. c. 69, which are as follows:—

"That where any person whose name appears on any list of voters for any county, city, town or borough, shall be objected to on the ground of having changed his place of abode, without having sent in a fresh notice of claim, it shall be lawful for the Assistant Barrister on revising the list to retain the name of such person on the list of voters if such person or some one on his behalf shall prove that he possessed on the 20th July, the same qualification in respect of which his name has been inscribed in such list, and shall also supply his true place of abode which such Assistant Barrister shall insert in such list."

8. It was contended by Mr. Harrington, that the words in question, although not in terms repealed were by necessary implication repealed by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), but that if they were not so repealed, they were at least, as the result of the division of the borough of Dublin into four Parliamentary divisions, limited in their application to a case in which the change of abode was from a place of abode in a particular Parliamentary division to another place of abode in the same Parliamentary division or from a particular place of abode on outside bounds to another place of abode on outside bounds.

9. Mr. Harrington, in support of this view argued that the concluding words above quoted of the 55th section of the Parliamentary Voters (Ireland) Act, 1850, did not, having regard to the division of the borough of Dublin into four Parliamentary divisions by the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, enable any such proposed transfer to be made, as such a transfer he contended would be a transfer from the list of one Parliamen-

tary constituency to the list of another Parliamentary constituency. He also particularly contended as regards the individual persons named in paragraph 4 of this case, that as they had never resided at the addresses for which they had been registered, any transfer of them to another division could not be regarded as a transfer by reason of a change of abode, and that as regards them, whatever might be the fate of the other names set out in Schedule A, hereunto annexed, they at all events could not be transferred to any other Parliamentary division as residing therein or to outside bounds for the purpose of allotment to the outside bounds of some other Parliamentary division. Mr. Harrington also contended that under no circumstances could persons be transferred to the outside bounds of any Parliamentary division without the process of allotment, but he conceded that a person who had been registered under the process of allotment on the outside bounds of any particular Parliamentary division and who had changed his place of abode to another part of outside bounds should be still retained on the outside bounds list of the particular Parliamentary division to which he had been originally allotted.

10. I was of opinion that the concluding words of the 55th section of the Parliamentary Voters (Ireland) Act, 1850, above quoted were not impliedly repealed by any of the provisions of the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, and that they were not limited in their application to a case in which the change of abode was from one part of a particular Parliamentary division to a place of abode in the same Parliamentary division or from one place of abode on outside bounds to another place of abode on outside bounds. I reached this conclusion by reason of the fact which was not contested by Mr. Harrington, that in the case of Parliamentary boroughs divided into separate divisions in which the freeman franchise exists the necessary six months' residential qualification may be derived partly from residence in one Parliamentary division of such borough and partly from residence in any other Parliamentary division of the same borough, or partly from residence in one or more Parliamentary divisions of the same borough and partly from outside bounds, or wholly from outside bounds, and also by reason of the fact that the unity of a Parliamentary borough divided into Parliamentary divisions seems

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for some important purposes to be preserved by the provisions of the 10th section of the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, and especially by reason of the provisions of the third sub-section of the 13th section of the same Act, which provides that for the purpose of determining the distance of the residence of any voter, and for all purposes of and incidental to the registration of voters in a Parliamentary borough divided into divisions, and for the purposes of the enactments respecting the division of any such boroughs into polling districts, all the divisions shall be deemed to form the same borough.

11. I was also of opinion that no voter who resided on outside bounds could without going through at some time the process of allotment be registered on the outside bounds of any Parliamentary division, but I concurred with Mr. Harrington that when an outside bounds voter had been once submitted to this process of allotment it would not, on his change of his place of abode to another part of outside bounds, be necessary to go through a second allotment, but that he was entitled to remain on the outside bounds list of the division to which he had been originally allotted on the alteration of his change of abode being inserted in the register.

12. I was also of opinion that the words, "the same qualification in respect of which his name has been inscribed in such list" occurring in the concluding part of section 55 of the 13 & 14 Vict. c. 69, above quoted, as applied to the alteration effected in the borough of Dublin by its division into Parliamentary divisions by the Re-distribution of Seats Act, 1885, was not a qualification which would disentitle a voter, without sending in a fresh claim, to be inserted in any List of Freemen save the list of the particular Parliamentary division for which he had been originally registered, but was the general qualification to be registered as a freeman by reason of a six months' residence wholly in anyone Parliamentary division, or partly in anyone Parliamentary division and partly in another, or wholly on outside bounds, or partly on outside bounds and partly in anyone or more Parliamentary divisions. I regarded the List of Freemen as in reality only one list split up by the Redistribution of Seats Act, 1885, into parts for the purposes of registration. I was influenced in arriving at this latter conclusion by an inspection of the forms Nos. 19, 23, and

28, relating to freemen inserted in the schedule attached to the Parliamentary Registration Ireland Act, 1885 (48 Vict. c. 17).

13. I was also of opinion as regards the particular names referred to in the fourth paragraph of this case that as an adjudication had already taken place in respect of those names by a preceding Revising Barrister who had placed them on the register, I was bound to assume that they had been placed properly on the register for the addresses indicated and I only admitted the evidence which went to question the accuracy of that adjudication *de bene esse*, for the purposes of an appeal.

14. I accordingly overruled Mr. Harrington's objections, and received evidence, in all cases in which it was offered, proving that the voters whose names I had expunged from the register as non-resident in the particular division for which they had been originally registered, had during the qualifying period resided in some of the other three Parliamentary divisions, or on outside bounds, or partly in some one or more Parliamentary division and partly on outside bounds.

15. It was proved, and I find as a fact, that the several persons mentioned in Schedule A, hereunto annexed, whose names I had expunged as non-resident from the List of Freemen for the particular division for which they had been originally registered, did reside on the 20th July, 1895, and during the whole of the qualifying period at the addresses indicated in the Schedule B, hereunto annexed, and which addresses I find as a fact are situated within the particular Parliamentary division indicated in the said Schedule B, or on outside bounds as indicated in said schedule.

16. In the cases in which they resided in a particular Parliamentary division, I inserted them in the List of Freemen for such Parliamentary division, and in the case in which they resided on outside bounds, I inserted them on the outside bounds list for the Parliamentary division to which they were entitled to be allotted in pursuance of the mode of allotment prescribed by the 14th section of the Redistribution of Seats Act, 1885.

17. None of the names transferred to outside bounds were allotted to Saint Stephen's-green division as the number of outside bounds freemen remaining at the end of the revision on the list of outside bounds freemen for that Parliamentary division was

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largely in excess of that for the other three Parliamentary divisions, and even after the allotment made by me, is still in excess of each of the said three other Parliamentary divisions.

18. Mr. Harrington on the part of the objector duly called on me to state a case for the consideration of Her Majesty's Court of Appeal, in respect of the several matters already referred to, as to which I decided against his contentions, and I consented to do so.

19. If I was in error in holding that I had power under the concluding words of the 55th section of the 13 & 14 Vict c. 69, above quoted, to insert the names of the several persons mentioned in paragraph 4 of this case in the particular Parliamentary divisions mentioned in Schedule B, although they had not sent in any fresh claims to be registered in respect of their residence at the places indicated in the said Schedule B, then such names are to be expunged from the list of the particular Parliamentary division for which I have inserted them, whether as resident therein or on the outside bounds, but if I was right in so holding, then no change is to be made in the register as revised by me.

20. If I was in error in holding that I had power under the concluding words of the 55th section of the 13 & 14 Vict. c. 69, above quoted, to insert the names of the several persons (other than those set out in paragraph 4 of this case), mentioned in Schedule B, hereunto annexed, although they had not sent in any fresh claims to be registered in respect of their residences at the places indicated in the said schedule, then such persons are to be expunged from the List of Freemen for the particular Parliamentary division in which I have inserted them, but if I was right in so deciding, then no change is to be made in the register as revised by me."

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21. "In pursuance of the provisions of the 16th section of the 13 & 14 Vict. c. 69, I certify that being of opinion, that the appeals in this matter depend upon and involve the same points of law and that the said appeals ought to be consolidated I have accordingly consolidated them.

22. I name Henry Campbell, of the City Hall, Dublin, Town

Clerk of the borough of Dublin, and Thomas Copeland of 60, Dawson-street, Dublin, a duly qualified voter of the borough of Dublin, he so consenting and being a person interested in the subject of these appeals, as respondents in these consolidated appeals.—Signed &c."

The several schedules followed.

The appeal came on for hearing on November 18, 1895, when it was stated by counsel for the appellant and admitted by counsel for the respondents that the words quoted in the foregoing case from the 13 & 14 Vict. c. 69, sect. 55, had been repealed by the Statute Law Revision Act, 1892, though they had been treated as still in force by both sides in the argument before the Revising Barrister. The Court accordingly ordered that the case should be remitted to the Revising Barrister with liberty to him to make such alterations if any, as he might think fit in order to raise the question of law which he intended to reserve.

In exercise of the power of amendment conferred upon him by the foregoing order, Mr. Teeling struck out the entire of paragraphs 19 and 20 as they stood in the original case and substituted new paragraphs numbered 19 and 20 in their place.

The new paragraphs were as follows:—

"19. If I was in error in inserting the names of the eight persons mentioned in paragraph 4 of this case, in the particular Parliamentary divisions set out in Schedule B, hereunto annexed, although they had not sent in any fresh claims to be registered as freemen in respect of their residence at the places indicated in the said Schedule B, then such names are to be expunged from the List of Freemen for the particular Parliamentary divisions for which I have so inserted them, otherwise they are to be retained therein.

"20. If I was in error in inserting the names of the several persons mentioned in Schedule B, hereunto annexed, other than the eight persons named in paragraph 4 of this case, in the particular Parliamentary divisions set out in Schedule B, hereunto annexed, although they had not sent in fresh claims to be registered in respect of their residence at the places indicated in the said schedule, then such names are to be expunged from the List of Freemen for the particular Parliamentary divisions for which I have so inserted them, otherwise they are to be retained therein."

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Harrington, for the appellant:—

By the 48 & 49 Vict. c. 23, sect. 8, the borough of Dublin was divided into four divisions, each of which returns a member. Each division is wholly separated from the others: no person can be registered as entitled to vote in more than one such division: the registers are therefore separate. The divisions are so far distinct one from the other that it required a special section (section 10), to provide that premises in different divisions occupied in immediate succession could afford a qualification for one of the divisions. But a person seeking to establish such a qualification should serve a succession claim. By the course which the Revising Barrister adopted here he has enabled persons to be transferred from a division where inquiry showed that they were not qualified to a division in which no opportunity for inquiry has been afforded. There was no power to transfer the name of a freeman from the list for one division to the list of another division, unless a claim was served. Section 34 of the 13 & 14 Vict. c. 69, expressly says that every person whose name has been omitted in any such list must give notice of his claim if he desires to be registered. It is now admitted that the power which Revising Barristers formerly had under section 55 of the 13 & 14 Vict. c. 69, has been taken away. [He referred to *Bartlett* v. *Gibbs* (1); *Burton* v. *Gery* (2); *Luckett* v. *Knowles* (3).]

Falkiner (with him *Ball*), for the respondent:—

Freemen are freemen not of a division but of the borough. There is but one List of Freemen for the borough: no doubt it is made up in parts corresponding with the divisions; but this is only for the purpose of assigning the qualified freemen to the proper division in which they are to vote. The respondents are all duly qualified freemen of the borough. They have had qualifying residence for the qualifying period. The Revising Barrister has rightly carried out the provisions of section 14 of 48 & 49 Vict. c. 23.

[They were stopped by the Court.]

Harrington, in reply.

(1) 5 M. & G. 81. (2) 5 C. B. 7. (3) 2 C. B. 187.

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SIR PETER O'BRIEN, L.C.J. :—

This case involves the consideration of the right to vote of several persons whose names appeared on the Town Clerk's List of Freemen for the borough of Dublin as resident in St. Stephen's-green division. It was proved before the Revising Barrister that none of these voters were as a fact resident within that division on the 20th July, 1895, though they still were duly qualified as freemen of the borough; and thereupon the Revising Barrister transferred them to the other divisions of the borough in which they were respectively entitled to vote.

Mr. Harrington contends that the Revising Barrister had no power so to transfer these voters as they had served no fresh notices of claim to be placed on the lists of the several divisions to which they have been transferred. He relies upon sect. 34 of 13 & 14 Vict. c. 69, which says, "Every person whose name shall have been omitted in any such list of voters for any borough so to be made out as aforesaid, and who shall claim as having been entitled on the 20th day of July then next preceding, by virtue of any other right than as a lodger, and every person desirous of being registered for a different qualification than that for which his name appears in the said list, shall on or before the 4th day of August give or cause to be given to the town clerk of such city, town, or borough a notice signed by him" according to the prescribed form.

This section requires two classes of persons to serve notice of claim: 1, persons whose names are omitted from any list directed to be made out for the borough, and, 2, persons desirous of being registered for a different qualification than that for which their names appear on such list. Are the respondents persons whose names are omitted from the List of Freemen directed to be made out for the borough? Mr. Harrington has argued that the effect of the Redistribution of Seats Act, 1885, is to create separate lists and registers for each division, and that the names of the respondents were omitted from the list for the division to which they have been transferred. I think, however, that there is to be made out by the town clerk now as heretofore but one List of Freemen for the borough. This seems to me to be the true effect of the provisions of the Redistribution of Seats Act, 1885, and of

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the forms given in the schedule to the Registration (Ireland) Act, 1885. Sect. 13, sub-sect. 3, of the former Act (48 & 49 Vict. c. 23), enacts "that *the lists and registers of voters for the borough* shall be framed, printed, and arranged *in parts* so as to correspond to the divisions thereof." The List of Freemen is to be *one* list for the entire borough, though divided into parts to correspond to the divisions. The form of precept of the clerk of the peace to the town clerk prescribed in the schedule to the latter Act (48 & 49 Vict. c. 17, Form No. 13), directs the town clerk to make out "another alphabetical list, according to the form (numbered 19) herewith sent, of all persons on the freemen's roll who shall be entitled to vote in the election for such borough." And Form No. 19 here referred to is headed, "The List for the year 18— of Persons on the Freeman's Roll for the borough of————," etc.

It is plain therefore that the List of Freemen is but one list for the entire borough, and it follows from this that the respondents in this case, whose names admittedly appeared on the List of Freemen for the borough, though not in that part of it which corresponds to the division in which they are entitled to vote, do not fall within the first category mentioned in sect. 34 of 13 & 14 Vict. c. 69, viz. persons whose names are omitted from any list to be made out for the borough.

It remains to see if the respondents come within the second class of persons on whom section 34 imposes the duty of serving notices of claim. Are they persons desirous of being registered for a different qualification than that for which their names appear on the list? In order to bring the respondents within this class Mr. Harrington was driven to contend that except in the case of "outside bounds" freemen—as to whom different considerations would apply—residence within a particular division was part of the qualification of a freeman entitled to vote for that division, and he accordingly had to argue that when a freeman changed his abode from the division where he was registered, and acquired a residence in a different division, he had a different qualification than that for which he appeared upon the list. But I can find nothing to show that having a residence within a particular division is part of the qualification of a freeman. Section 33 of 13 & 14

Vict. c. 69, directs the town clerk to place on the List of Freemen all persons on the freemen's roll except such as shall not have resided for six calendar months next previous to the 20th day of July, within the borough or within seven statute miles of the usual place of election therein. The qualification of freeman therefore used to be and is now—unless there is some enactment altering it—(*a*) enrolment as a freeman, and (*b*) residence in the borough or within the prescribed radius. Has any enactment altered this qualification? We have been referred to no such statute. On the contrary, I find in the precept of the clerk of the peace to the town clerk prescribed in the schedule to the Registration (Ireland) Act, 1885, a direction that there are to be placed on the List of Freemen, "all persons on the freemen's roll, omitting such as shall not have resided for six calendar months next previous to the said 20th day of July, in this year within the said borough, or within seven statute miles of the usual place of election therein." Accordingly I am of opinion that no change has been made in the qualification of freeman, and therefore it is not of the essence of the qualification of a freeman that he should be resident in a particular division of a borough. He is still, as he always was, a freeman of the borough, not of a division of the borough. It follows that he does not acquire a different qualification by changing his place of abode from one division into another: he still has his name on the freemen's roll; he is still resident within the prescribed limit: his qualification is one and the same. I am therefore clear that the respondents do not fall within either of the classes upon whom section 34 of the 13 & 14 Vict. c. 69 imposes the duty of serving notice of their claims.

The only question that remains is as to the mode in which the names of the respondents were to be dealt with, when it was proved that they had changed their abode into another division from that in which their residence had been as stated in the list. In my opinion the appropriate procedure is that prescribed by sect. 14 of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), which says:—"1. In a Parliamentary borough divided into divisions persons registered as freemen shall be entitled to vote; (*a*) if their place of abode is in the borough, then in the division in which such place of abode is situate; and (*b*) if their place of abode is not in the borough, then

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in the division to which such persons (in this section referred to as non-resident freemen), are allotted by the Revising Barrister, and *shall not be entitled in respect of the qualification of freeman to vote elsewhere* than in such division"—thus drawing a distinction between the existence of the qualification and the right to exercise the franchise in respect of it—"and the registration of voters shall be conducted and the register of voters arranged so as to give effect to this enactment." Under the last words of this clause it became mandatory on the Revising Barrister to place the names of the respondents in the parts of the list appropriated to and corresponding with the divisions in which they were entitled to vote under the earlier part of the section. That is the course which the Revising Barrrister adopted in this case, and in my opinion his decision was in the result right and should be affirmed.

PALLES, C.B.:—

The question is whether a freeman who during the qualifying period has changed his place of abode from a residence in one division of a borough to another within the borough or the seven miles limit is obliged to serve a fresh notice of claim.

Under the Act of 1850, such a procedure would not have been necessary: sect. 33 imposes upon the town clerk the duty of placing upon the List of Freemen all persons on the freemen's roll who were entitled to vote in the election of the borough, and directs that "the place of abode"—which, in my opinion, means the place of abode as known to the town clerk—is to be set out in the list. Thus if the town clerk knew of any such change of residence he should state in the list the true residence. So matters stood before the legislation of 1885. By the Registration Act of that year (48 Vict. c. 17) a form of precept to the town clerk is provided which directs him to place upon the freemen's list all persons on the freemen's roll who shall be entitled to vote in the election for the borough, and also to omit from the list all such freemen as shall not have resided for the necessary six months within the borough or within seven statute miles of the usual place of election therein; and Form No. 19 in the schedule to the same Act gives the essential parts of the freemen's list, which in its third column is to contain "the place of abode." In effect therefore this Act preserves the

provisions of the Act of 1850, and in the case of an undivided borough it is plain that where a freeman has changed his place of abode, without losing his qualification, it would be the duty of the town clerk to place his name on the freemen's list, specifying his true place of abode as known to him at the date of the list.

Then came the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), in which there are two provisions relating to these hybrid constituencies. Section 13, sub-sect. 3, enacts that "for the purpose of determining the distance of the residence of any voter, and for all the purposes of and incidental to the registration of voters in a Parliamentary borough, divided into divisions, and for the purpose of the enactments respecting the division of any such borough into polling districts, all the divisions shall be deemed to form the same Parliamentary borough provided that the lists and register of voters for the borough shall be framed, printed, and arranged in parts so as to correspond to the divisions thereof, and the voters in each division shall be numbered in a separate series." There is therefore in a divided borough but one List of Freemen, and though it is directed to be divided into parts corresponding to the several divisions, that is only (as we shall see) for the purpose of convenience in ascertaining the division in which the freemen are to vote. The next subsection enacts that "the election for two or more of such divisions shall be deemed to be the same election," for the purpose of preventing any elector from voting for more than one division. Accordingly, as the qualification of a freeman is a qualification for the entire borough, it became necessary that some provision should be made for ascertaining in which division of the borough he should vote. This provision is made by section 14 of Act, and it is on this section alone that the question turns. It enacts—(1) "In a Parliamentary borough divided into divisions persons registered as freemen shall be entitled to vote (*a*) if their place of abode is in the borough, then in the division in which such place of abode is situate; and (*b*) if their place of abode is not in the borough then in the division to which such persons (in this section referred to as non-resident freemen) are allotted by the Revising Barrister, and shall not be entitled in respect of the qualification of freeman to vote elsewhere than in such division."

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Thus section 14 does not in terms profess to alter the qualification of freeman or franchise, but it does profess to alter the place where the franchise is to be exercised. The section proceeds: "And the registration of voters shall be conducted and the register of voters arranged so as to give effect to this enactment." Then follows in sub-sect. 2, a provision imposing on the Revising Barrister a duty to give effect to this enactment in the case of these non-resident freemen. This section plainly does not alter the qualification in their case, and it is impossible to hold that the true effect of the legislation is to alter the qualification as to resident freemen and not as to non-resident freemen. Sub-sect. 2 of section 14, in my opinion, gives a colour to the whole section, and shows that the intention of the Legislature was not to alter the character of the franchise of freemen residing within the borough, but to change the place in which that franchise was for the future to be exercised.

I therefore hold that it was the duty of the town clerk to place the names of these respondents upon the list, specifying their place of abode as known to him, and that when the list was being settled the duty was thrown upon the Revising Barrister of arranging the list so as to give effect to section 14 of the Redistribution of Seats Act, 1885. This is, in the result, what Mr. Teeling has done. In conclusion I desire to say that even if there were no such provision as that which is contained in section 14, as to giving effect to the matters enacted therein, I should be prepared to hold that the statement of the wrong place of abode in the case of the several respondents was a "mistake" of the ministerial officer charged with making out the list, and that it was a plain case for amendment under section 27 of the 48 Vict. c. 17.

FITZ GIBBON, L.J.:—

The Parliamentary qualification of a freeman consists in—1, having been rightly admitted and placed upon the Municipal Roll, and—2, having resided for the prescribed period of six months within the borough, or within seven statute miles of the usual place of election therein. Under the Act of 1850, section 14, any person who had fulfilled these two conditions, and who had got his name upon the Parliamentary Register, came within the jealous

protection which the Registration Acts afford to persons whose claims have been once regularly established, and who are "upon the register of voters." Mr. Harrington contends that the recent legislation, as to the redistribution of seats and division of constituencies, has in effect removed this protection, and has rendered it necessary for every already registered freeman to send in a fresh claim, though he has resided during the whole qualifying period within the prescribed limit, if he has removed from one place of abode to another, both being within the limit. In short, he contends that the actual place of abode, the "address," forms part of the qualification, and must therefore be stated in the list.

Let us take the question in its simplest form. Take a freeman in an undivided borough, Cork or Limerick, for instance. If Mr. Harrington's argument were correct—that the place of abode was an essential part of the qualification—it would necessarily follow that the List of Freemen, as in the case of successive occupiers, should disclose on the face of it every residence which the freeman occupied during any portion of the qualifying period, and that equally in the case of those already on the register as of those who sought the franchise for the first time. But the form of precept to the town clerk in the schedule to the Registration Act, 1885, Part II., shows that no such contention can be maintained in the case of an undivided borough, for only those freemen are to be omitted who "shall not have resided for six calendar months next previous to the 20th day of July in this year within the borough or within seven statute miles of the usual place of election therein." A change of abode within the limit does not affect the right to remain on the register. No doubt the locality of the residence is material, for it must be within the prescribed limit, but the town clerk is charged with the duty of keeping every qualified freeman on the register, and he cannot omit any registered name until something takes place which ought to put it off. It is plain, therefore, that the town clerk in an undivided borough is bound to retain upon the freemen's list Form No. 19, as "entitled to vote," every freeman who has resided within the prescribed limit for the prescribed time, without taking changes of abode further into account than to see that all the places of abode are within the prescribed limits. No doubt the town clerk's means of information

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are very defective, but if Mr. Harrington's argument were right, every freeman who had moved from one house to another in the borough should be omitted by the town clerk, unless all the residences were supplied, yet the Acts or forms do not indicate that more than one place of abode should in any case be stated in the list. The argument goes even further, for if the registered freeman found his name retained in the list, and found his last place of abode correctly given, he would still be obliged to send in a claim, if any house in which he had resided for any part, however short, of the qualifying period, was not specified.

In my opinion the law is the same in divided boroughs. The Redistribution Act, 1885, sect. 13, sub-sect. 3, enacts that "for all purposes of and incident to registration, all the divisions shall be deemed to form the same Parliamentary borough, provided that the lists and register of voters *for the borough* shall be framed, printed, and arranged *in parts* so as to correspond to the divisions thereof." The unity of the borough thus preserved, in my opinion, entails the unity of the list and register also, and keeps alive the qualification of the freemen of the borough as voters for the borough, though the divisions in which individuals are entitled to vote may be changed by change of abode. The list is to be *arranged in parts*, so that every freeman shall vote in the proper division, but it is still *one list*, and no one who has "the qualification of freeman" can be taken off the list, though the register must be "arranged, so as to give effect to" the enactment contained in sect. 14. The first part of this section provides that those freemen whose "place of abode is the borough" shall vote "in the division to which such place of abode is situate"; and those whose "place of abode is not in the borough" are to be allotted by the Revising Barrister. Here the "place of abode" cannot be necessarily continuous: the category into which each freeman falls, for the purpose of voting, must be fixed by the locality of his place of abode on the last day of the qualifying period, and that address only is therefore material. There is nothing to make residence in a particular division part of "the qualification of freeman" for that division: on the contrary, the qualification of the "persons registered as freemen" of the borough is distinctly recognised, and section 14 only restricts the right in respect of the qualification of freeman to

vote elsewhere than in the division to which the voter is assigned or allotted in the manner prescribed by the section itself. The due arrangement and allotment is a ministerial duty of the Revising Barrister, and when he found that the places of abode of the respondents were wrongly stated on the list, I think he was clearly bound to do as he has done, namely—to insert the correct places of abode, and to assign the names to the right divisions for the purpose of voting. This is, in my opinion, the effect of the mandatory words in section 14. "The registration of voters shall be conducted and the register of voters arranged so as to give effect to this enactment." This construction leaves legitimate effect to be given to an objection served upon a freeman based on his not being resident in the place of abode stated in the town clerk's list. It is a special traverse of his qualification. When the objection is heard, it is not enough to disqualify a freeman to show that he does not reside in any particular house, but when the objector proves that he does not live in the place of abode stated in the list, I think this fairly amounts to a *prima facie* case against the franchise, and shifts the *onus* of proof, as it were. Still, if satisfactory information is thereupon supplied, showing that the freeman has resided within the prescribed limit during the whole qualifying period, it is, in my opinion, the duty of the Revising Barrister to correct the statement of the place of abode, and to place the vote upon that part of the list which will entitle him to vote in the proper division of the borough.

I base my judgment entirely upon the Redistribution Act, 1885, section 14; but it is not out of place to refer to the analogous enactments of the Registration Act, 1885, section 27, by which it is provided that the Court "shall expunge the name of every person . . . whose . . . place of abode . . . is . . . wholly omitted, or in the judgment of the Revising Barrister insufficiently described for the purpose of being identified, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of the Court before it shall have completed the revision of the list in which the omission or insufficient description occurs, and in case such matter or matters shall be so supplied the Court *shall* then and there insert the same in such list." Once we come to the conclusion that the place of abode, as

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distinguished from residence within the prescribed limit, is not part of the qualification of a freeman, the particular place of abode becomes material only for the purpose of showing the division to which he is to go in order to vote; there is no power to strike him off the list altogether if he is qualified by residence, and the Revising Barrister is bound to arrange the list so that he shall vote in the proper division.

BARRY, L.J.:—

I concur, though not without doubt and perplexity owing to the confused method in which the matter has been dealt with by the Legislature.

The basis of Mr. Harrington's argument is that by section 14 of Redistribution of Seats Act, 1885, the particular residence or place of abode mentioned in the list has been made an essential part of the qualification of freeman. He assumed this proposition to start with and then argued from it as a basis that any change in the place of abode should be notified in the form of a fresh claim to the official so as to secure that the name of the voter should be put into the right list, and also that notice should be given to any person who might desire to object. I think the weakness of this argument lies in the assumption that the place of abode of a freeman as stated in the town clerk's list of freemen is an essential part of the freeman qualification. No doubt in one sense residence is an essential part of this qualification, that is, a freeman must have resided somewhere within the borough or within seven miles of the borough for six months. But any residence within these limits for that period will satisfy this requirement. However I fully appreciate the objections that may be raised under the present system, to the want of some notice of the fact being given to the officials and the objectors by a freeman who has changed his residence. The prescribed practice is to enter on the list the place of abode of the freeman as known to the official on the 20th of July. The statement of the place of abode so made by the official, though made in good faith, may be incorrect; and if it is not correct nothing is calculated to be more misleading to the persons scanning the register in an adjoining division to which on ascertaining the freeman's true address the Revising Barrister must

transfer the freeman for the purpose of voting. This procedure affects the two constituencies, both that to which the voter is transferred and that from which he is abstracted, and yet there is nothing published to put the objectors in the former constitutency upon inquiry.

I own that the machinery seems to me defective; but I think Mr. Teeling has adopted the procedure intended by the Legislature, and I concur with the judgment of this Court in declaring that his decision should be affirmed.

WALKER, L.J.:—

The foundation of Mr. Harrington's argument is that by the Redistribution of Seats Act, 1885, the place of abode has been made an essential part of the qualification of a freeman. Admittedly, prior to that Act, the qualification of a freeman consisted of three different matters:—(1) Admission as such by the proper tribunal; (2) enrolment in due form; and (3) residence within the borough, or within seven statute miles of the usual place of election therein. But the place of abode of the freeman only entered into the qualification to this extent that whether the freeman had resided during the qualifying period in one or more place or places of abode, it or they all must have been within the prescribed limits. If a freeman changed his residence from one place of abode to another within the prescribed limits he did not change his qualification. Such was the state of the law when the Redistribution of Seats Act, 1885, was passed. That Act divided various boroughs into divisions, and it thereupon became necessary to ascertain in which of these divisions the freemen—who were freemen of their respective boroughs—were to vote. Provision for this matter was made by section 14 of the Act. This section has been read already, and without repeating it I desire to say that it plainly does no more than prescribe the mode in which the proper division for voting purposes is to be assigned to each freeman. I concur with the Lord Chief Baron in thinking that the colour lent to the whole section by the second sub-section removes any question which could possibly arise on the first sub-section. And in the first sub-section we find clear evidence that this is the proper interpretation of the section. In the phrase by which

Appeal. 1895. NAGLE v. CAMPBELL. Walker, L.J.

Parliament declares that persons registered as freemen "shall not be entitled in respect of the qualification of freeman to vote elsewhere" than in the division to which they are assigned, I think the "qualification of freeman" is placed in direct contrast to the place where the person is entitled to vote in respect of that qualification. I therefore can find nothing to alter the qualification of freeman as it existed prior to this Act, and cannot follow Mr. Harrington's contention that a change of the place of abode within the prescribed limits is a change in the qualification. As to the power of the Revising Barrister to transfer the names of the respondents in the manner which he has adopted, I think not only had he this power, but it was incumbent on him to exercise it under the words of section 14, which declares "that the registration of voters shall be conducted and the register of voters arranged so as to give effect to this enactment." At the same time I agree with Lord Justice Barry in thinking that the appointed machinery is defective. However, that is a matter with which it is not our province to deal.

The judgment of this Court is that the decision of the Revising Barrister should be affirmed, but no costs of the appeal given, as the case is decided on different grounds from those which were, as it is now admitted, wrongly relied upon in the argument of the case in the Revision Court.

Solicitor for the appellant: *M'Gough.*
Solicitor for the respondent: *Deverill.*

G. Y. D.

IN RE LAWRENCE'S ESTATE (1).

Appeal.
1895.
Nov. 4.
Dec. 20.

Owner of an insolvent estate—Tenant under the Court pending the matter—Proposal to purchase—Land Purchase Acts, 1885-1891.

Under a settlement, dated the 22nd June, 1848, in the events which had happened, C. L. was tenant for life of an estate which was insolvent. In 1880 C. L. presented a petition to the Land Judge's Court for a sale of the fee-simple, to pay the incumbrances, which exceeded £26,000. For three years prior to May, 1895, C. L. had been tenant under the Court of portion of the estate, comprising 922 acres at the rent of £393. On the 24th May, 1895, he otained from the Land Judge a lease for seven years, pending the matter. On the 15th May, 1895, C. L. sent in a proposal to the Land Purchase Commissioners to purchase the said holdings at the price of £7620, agreeing to lodge £2620, and seeking an advance of £5000 from the Land Purchase Commissioners. The proposal was refused as not being within the Act. On appeal to the Court of Appeal:—

Held by the Lord Chancellor and Barry, L.J., that the Land Purchase Commissioners having, in the exercise of their discretion, refused the advance their order should be affirmed.

Held by the Lord Chief Justice and Fitz Gibbon, L.J., that the person applying for the advance was not a tenant within the meaning of the Land Purchase Acts, and that the Commissioners had no jurisdiction to make the advance.

APPEAL by the Rev. Charles Lawrence from an order dated the 25th June, 1895, made by Bewley, J., Mr. Commissioner Fitz Gerald, and Mr. Commissioner Lynch, declaring that the said Charles Lawrence was not entitled to obtain an advance under the Land Purchase Acts.

By a settlement dated the 22nd June, 1848, executed on the marriage of Captain Walter Lawrence with Miss Olivia Bellew, and in the events which had happened, the Rev. Charles Lawrence became tenant for life of certain lands in the Co. of Galway.

On the 5th May, 1880, the Rev. Charles Lawrence presented

(1) Before LORD ASHBOURNE, C., SIR PETER O'BRIEN, L.C.J., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1895. *In re* LAWRENCE'S ESTATE.

a petition in the Chancery Division—Land Judge, for the sale of the fee-simple of the said lands for the discharge of the incumbrances which amounted to over £26,000. The said Charles Lawrence had been for three years tenant under the Land Judge for 841A. 3R. 25P. of the lands of Lisreaghan at the yearly rent of £369, and of part of the lands of Lawrencetown containing 23A. 3R. 27P. at a yearly rent of £4, and part of the lands of Craughwell containing 56A. 2R. 23P. at a rent of £20. These portions of the lands he held under the Court under a seven years' lease dated the 4th June, 1895, pending the matter; and the rent was fixed as the result of two independent valuations.

The lands of Lisreaghan were formerly the demesne, but had long since ceased to be such, and they were tenanted by three tenants in addition to the said Charles Lawrence, and they had all sent in proposals to purchase.

To enable him to purchase his holding the said Charles Lawrence applied on the 15th May, 1895, for loans amounting to £5000. The total of the purchase-money amounted to £7620, and the applicant proposed to bring in £2620 in cash, and applied for the balance to be advanced. On the 11th June, 1895, Mr. Commissioner O'Brien refused to sanction the advance, stating:—"In the Commissioner's opinion an owner is not entitled to a loan even though he has been made a tenant to the Court pending the matter; nor were the purchase funds intended to be used in enabling owners to buy their own demesnes." On appeal to the Land Purchase Commissioners, this ruling was confirmed by order dated the 25th June, 1895, and from that order the Rev. C. Lawrence appealed.

White, Q.C., *Ronan*, Q.C., and *Russell*, for the appellant:—

If the lease was made pending the matter, not to the owner, but to some other person he could purchase, and such sales have been constantly carried out by the Land Purchase Commissioners. The Rev. Charles Lawrence, as the owner of an insolvent estate, had no interest in the estate beneficially, though nominally the owner, as the equity of redemption. He fulfils the definition of a tenant as the person in occupation as tenant.

A letting for seven years pending the matter may be a letting

for temporary convenience, as in *Croker* v. *Clanchy* (1); but that was minor matter, and no letting was actually made. Reading sect. 4 of the Act of 1885 into sect. 2, this is a sale by a landlord to a tenant. Where a statute is of a public nature, and is intended to confer a public benefit, "may" is understood as "shall": *Rex* v. *Barlow* (2).

Enabling words are always compulsory where they are words to effectuate a legal right: *Julius* v. *The Bishop of Oxford* (3). In *Reg.* v. *Bishop of London* (4) a section of the Public Worship Act, 1874, enacted that steps should be taken to have a matter of complaint brought to trial, unless the bishop "after considering the whole circumstances of the case" should otherwise direct. These words were held to confer a judicial discretion: see Hardcastle on Statutes, 316.

LORD ASHBOURNE, C.:—

Dec. 20.

This is an appeal from an order of the Land Commission, affirming an order of Mr. Commissioner O'Brien, and it turns upon a very few and simple considerations. Mr. Commissioner O'Brien heard an application that the Land Commission should send in a proposal to purchase lot 1 of this estate. On that lot 1 there were seventy tenants; the owner the Rev. Charles Lawrence had three holdings comprising 922 acres as tenant under the Court, the remaining sixty-nine tenants occupied farms whose aggregate area was 1152 acres. The Rev. Charles Lawrence, the owner, was tenant of his three holdings under the Court pursuant to the terms of a lease made in May last by Monroe, J., for seven years pending the matter. His proposed purchase-money was £7620, and he sought an advance of public money of £5000—a sum which under the Land Purchase Act of 1885 could only be advanced if the Land Commission considered it expedient for the purpose of carrying out sales on the estate of the same landlord. The purchase-money of the remaining tenants was £11,500, many of the holdings being very small, twenty-seven of them being actually under two acres. Mr. Commissioner O'Brien in the exercise of his discretion refused the application. It must be always a

(1) 20 L. R. Ir. 111.
(2) 2 Salk. 609.
(3) 5 App. Cas. 214.
(4) 24 Q. B. Div 213, 225.

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matter requiring much discretion to consider a proposal to buy an estate with a view of selling it to its tenants, and when an advance of £5000 is asked for by one tenant, the discretion can only be exercised for the purpose of carrying out sales on the estate of the same landlord. Appeals are only allowed under the Purchase Acts on questions of law, and it is hard to conceive a more purely discretionary matter than this case, as I have stated it. Mr. White and Mr. Ronan however say that there is a question of law in the case and that Mr. Commissioner O'Brien and the Land Commission proceeded on the ground that the tenant here was the owner himself and that the Purchase Acts were not intended for giving advances to owners to buy their own demesnes. No doubt the order of Mr. Commissioner O'Brien gives this (*inter alia*) as a reason, and therefore it may be well to shortly notice it. The Purchase Code was granted for the benefit of occupying tenants, and it never was contemplated that on the same estate the same person should fulfil the double function of being both owner and tenant. *Prima facie* it would appear absurd to advance public money to a tenant to become the owner, if he was the owner already.

But it is argued that the facts here are special, the estate is practically insolvent, the owner is merely a nominal owner, and he has the *status* of a tenant under the Court pending the matter. During the argument we addressed an inquiry to the Land Commission as to whether it was the practice to make advances to such tenants, whose tenure was under the Court and pending the matter. We were apprised that it was the practice, and also furnished with a copy of the judgment of Mr. Justice Bewley in this case. The owner then argued that if other tenants pending a matter were given advances, why should not he also be given an advance, when he was also such a tenant? No doubt this is in its facts a peculiar case. The owner really owns nothing, but his name gives the title to the matter, and therefore is he on that ground to be denied the same consideration that appears to be given to all other tenants pending a matter? Whenever that question is presented in a net form for decision, I shall of course consider it, but here there can be no manner of doubt that the order of the Land Commission must be affirmed. Mr. Justice

Bewley in the course of his judgment expressed his opinion against the owner being a person entitled to an advance under the Purchase Acts and went on to say, "It is not, however, a question as to whether Mr. Charles Lawrence is a tenant or not, or whether an advance could legally be made to him or not. It is a question as to whether in the discretion vested in the Land Commission, this exceptional sum of £5000 should be advanced to the owner of an estate to enable him to buy portions of the estate of which he is tenant, merely because the estate is incumbered and is now in Judge Monroe's Court."

I am of opinion that the appeal must be dismissed.

SIR PETER O'BRIEN, L.C.J.:—

I concur in thinking that this decision should be affirmed. I do so upon this ground, viz. that this gentleman is not a tenant within the meaning of the Act of Parliament. It appears that he is the owner of an estate which is being sold in the Landed Estates Court, and during the progress of the proceedings in that Court he obtained a lease of portion of the estate for seven years pending the matter. That lease was made on the 3rd May, 1895, by Mr. Justice Monroe to the appellant the Rev. Charles Lawrence and it recites as follows:—"Whereas, by a ruling bearing date the 2nd May, 1895, made in the matter of the estate of the Rev. Charles Lawrence owner and petitioner, it was directed that the proposal of the said Charles Lawrence to become tenant to the land and premises hereinafter mentioned should be accepted upon the terms of his executing a lease thereof according to the course of the Court"; it then after demising the lands for seven years pending the matter contains the following proviso:—"Provided always that nothing herein contained shall extend or be construed, deemed, or taken to extend in any sort to affect, injure or prejudice the person or estate, real, freehold or personal of the said John Monroe, his heirs, executors, administrators, or assigns, he having acted in the premises in pursuance of the said ruling and in no other right or colour of right whatsoever." This is the lease, and on the very face of it it appears that Mr. Lawrence is owner, and that Mr. Justice Monroe had no estate or interest in the premises whatever. We have not, in my opinion, such a tenant and such a landlord as

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are contemplated by the Act. It has been said that Mr. Lawrence has no pecuniary interest in the estate now, but that does not make him a tenant within the meaning of the Act of Parliament, though it may attenuate his position as owner. What is the meaning of the Act of Parliament? What was its scope and object? What is its genesis? The germ of the Act is to be found in the Bright clauses of the Act of 1870. Those clauses found a further development in the Act of 1881. This latter Act failed by reason of the whole purchase money not being advanced, and the Act of 1885 was passed which had the same scope and object and was workable and successful because it provided for the advance of the entire purchase money, subject to the provisions as to the guarantee deposit. The object of all these Acts was to abolish dual ownership by buying out the landlord. The present application is simply a hardy attempt to apply the machinery which was designed to get rid of the landlord to restore him, to buy in a landlord instead of buying him out. The Land Commission—a great public department bound to administer the Act according to its scope and object—are certainly entitled to look at the reality of the transaction, and the reality of the transaction is, that this gentleman is the owner, paying a certain occupation rent for the privilege of occupying a portion of his own estate. The question before us is not in my judgment a question as to the exercise of discretion, it is a question of jurisdiction. Mr. Lawrence is not a tenant, within the meaning of the Act of Parliament, and therefore an advance cannot be made to him. The Land Commission has no jurisdiction to make an advance to a man who is not a tenant within the meaning of the Act. A question was addressed by the Lord Chancellor to the Land Commission during the argument as to whether it was their practice to advance money to persons, other than the owner, who were tenants under the Court pending the matter, and they said that that was so. I am not to be taken as laying down that that practice is sanctioned by the Act of Parliament. When it is necessary for me to do so I shall express my opinion on it: but I doubt whether a person who is not a tenant by demise, who does not take an interest by demise, but is merely a tenant by estoppel, is within the Act. All I decide at present is, that a person, who is the owner, and who is paying an occupation rent for permission

to occupy part of his own estate, is not a tenant within the meaning of the Act, so as to enable him to get an advance under the Act. We have not such a tenant and landlord here as attract the operation of the statute.

FITZ GIBBON, L.J. :—

We are all agreed that the appeal must be dismissed. Early in the argument I suggested to Mr. Ronan that this appeal could do no good. The only order which we could make, if we thought that the appellant was a "tenant" within the Land Purchase Act would be, to declare that we were of that opinion, and to send the case back to the Land Commission, which would still have the power of refusing the application in the exercise of their discretion, and would further be bound to refuse any advance exceeding £5000, and not to grant any sum exceeding £3000 except upon special grounds. However, for two reasons, I can not concur in dismissing the appeal merely on the ground that the order appealed from is discretionary. First, the order of the Land Commission, as officially made up, and as appealed from, contains an express declaration of the ground of decision; and if this is erroneous in law, the appellant is entitled to have it reversed, and to have our declaration to that effect. The order recites that Mr. Ronan moved the Land Commission by way of appeal from the order of Mr. O'Brien, whereby he declined to make any advance for the purchase of lot 1 on the rental, "*on the ground inter alia* that the said Rev. Charles Lawrence, the intending purchaser, was not entitled to obtain an advance under the said Purchase Act," and the order proceeds "that the appeal be dismissed, *and that the ruling of Mr. Commissioner O'Brien be confirmed.*" Under those circumstances we are bound to consider, and in my opinion to decide, whether that ruling was right in law.

But my second ground for declining to base my judgment on the discretionary character of the order is a wider one. If the discretion had been exercised the other way, and anyone had objected to an order sanctioning the advance, in my opinion we should have held that it was an order made without jurisdiction, and it would have been our duty to set it aside.

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Fitz Gibbon, L.J.

For these reasons I think we must now consider whether, on the facts of this case, the appellant is or is not within the Purchase Acts; and I agree with the Lord Chief Justice in holding that he is not. The object of the Act of 1885 is stated in its title—"to provide greater facilities for the sale of land to occupying *tenants*;" and in sect. 2—"for enabling tenants to purchase their *holdings*, either from the Land Commission, or *from the landlords of such holdings*." The case in which the Land Commission can sell to tenants is defined in section 5, viz.—"The Land Commission, if they have reasonably satisfied themselves that a resale can be effected without loss, may purchase any estate for the purpose of reselling to the tenants of the lands comprised in such estate *their respective holdings*, and may purchase any *holding* for the purpose of reselling it to the tenant thereof: provided that such purchase of an estate shall *only* be made if the Land Commission are reasonably satisfied that *holdings* to the extent of not less than four-fifths in value and number of the estate will be purchased *by the tenants thereof*." Therefore the only land which can be purchased is land comprised in the "holdings" of "occupying tenants." By section 26 the definitions in the Act of 1881 are incorporated, and "holding," therefore, means "a parcel of land held *by a tenant of a landlord*." It therefore appears to me that, on the face of the Act, before any land can become the subject of an advance, there must be both a landlord and a tenant of that land. The object of the whole thing is to get rid of "dual ownership," by enabling the tenant to acquire the landlord's interest, so that his own may merge in it. Mr. Ronan argues that his client is a tenant, and that the Court is a landlord. I cannot take that view at all. No doubt, for certain purposes, an owner occupying under a Court letting is a tenant by estoppel. But the Legislature and the Land Commission are not parties to the estoppel, and the intention of the one, and the jurisdiction of the other, rests on the truth; and the fact of the co-existence of a landlord's interest and a tenant's interest in the same parcel of land is essential to the purchase. I don't decide that no Chancery tenant, no tenant by estoppel, can be within the Act. A landlord's estate may be under a receiver, and the Land Judge or the receiver may make a letting to an occupier which will make him a tenant by estoppel to the official landlord; but in such a case there is a real

landlord, and the dual ownership and the Purchase Act may apply. In that case the landlord's estate exists, and is bound by the tenancy of the occupier, because the letting has been made through the power of the Court. There is dual ownership none the less, because the estate of the landlord, as distinct from the interest of the tenant, is administered by the Court.

In this case it is contended that the appellant is only nominally an owner; but that will not make him really a tenant. It only shows that he has no substantial interest in the estate at all. In fact, his desire to purchase is probably due merely to the recollection of some time when his family had some interest in the property over and above the mortgages, whereas now there is nothing left. The object of the Purchase Act certainly is not to advance public money to mortgagors to enable them to pay their debts; far less is it to enable mortgagees whose incumbrances exceed the value of their security to obtain payment at the cost of the public. This appellant is, in no view of the case, in my opinion, within the Act; and if an order for an advance had been made in his favour, and had been appealed from, I should have set it aside.

BARRY, L.J.:—

I agree that the appeal should be dismissed, but without costs, as Mr. Ronan says this is an *ex parte* appeal. I think the view taken by the Lord Chancellor is the correct one, and that we are not bound to say on this appeal, as an abstract question of law, whether any man filling the position of a landlord in the Land Judge's Court, can, by getting a letting made to himself, obtain a loan of public funds to pay off incumbrances. I think this order, made by the Land Purchase Commissioners, was made in the exercise of their discretion, and whether it is purely discretionary or not, so as not to be the subject of appeal, in my opinion, we ought not to disturb it.

Solicitor for the appellant: *W. J. Shannon.*

R. D. M.

Appeal.
1896.

Jan. 29.

CURNEEN, Tenant; TOTTENHAM, Landlord (1).

Landlord and tenant—Notice by tenant of intention to sell tenancy—Election by landlord to purchase—True Value—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49 *s.* 1 (3)).

The true value of a tenancy within the meaning of sect. 1, sub-sect. 3, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), is not restricted to the value of the improvements on the holding made by the tenant or his predecessors in title, for which he has not been paid or compensated by the landlord. The principles expressed by Mr. Trench, Q.C., in *Ager* v. *Sealy* (27 Irish Law Times, 63) approved and adopted.

Case stated by the Land Commission.

The holding contained twenty-two statute acres, and was held under a tenancy from year to year at a judicial rent of £4 15*s.* which was fixed in 1884. The tenant having served notice on the landlord of his intention to sell the tenancy the landlord claimed to exercise the right of pre-emption given to him by section 1 of the Land Law Act, 1881, and having disagreed with the tenant as to the price served an originating notice to have the true value of the tenancy ascertained by the Land Commission. The Sub-Commission, before whom the case came for hearing, by an order dated the 24th July, 1895, fixed the true value at the sum of £30. The landlord having served notice for a rehearing the case was reheard before the Land Commission at Enniskillen on the 24th October, 1895; there was no appearance for the tenant who had gone to America

The holding was a mountain holding used only for grazing, and the tenant did not reside on the holding; there were no buildings on it, and no improvements had been made by the tenant or his predecessors in title. The landlord contended that the true value of a tenancy within the meaning of the 1st section of the Land Law Act, 1881, was to be measured by the value of

(1) Before Lord Ashbourne, C., and FitzGibbon, Barry, and Walker, L.JJ.

the tenant's improvements for which he had not been paid or otherwise compensated by the landlord, and as no such improvements were shown to exist in this case it was urged that the true value should be fixed at a nominal or small sum. The Land Commission being of opinion that what the tenant was selling, and the landlord was buying, was not merely the tenant's interest in any improvements made by him or his predecessors in title, but the tenancy itself with all such rights as are given to the tenant of a present tenancy by the Land Act of 1870 and the Land Law Act, 1881 (1), fixed the true value at £30. On the application of the landlord they stated a case for the decision of the Court of Appeal, and the question was :—

Is the true value of a tenancy within the meaning of the 1st section of the Land Law Act, 1881, restricted to the value of the improvements on a holding made by the tenants or his predecessors in title for which he has not been paid or otherwise compensated by the landlord or his predecessors in title ?

Cherry (with him *R. E. Meredith, Q.C.*), for the landlord :—

The "true" value in sect. 1, sub-sect. 3 of the Act of 1881 must either mean the value of the improvements effected by the tenant, or the marketable value of the holding when sold; and there is no mean between them. All the decisions already pronounced, with the exception of *Ager* v. *Sealy* (2), proceed upon the basis that it is not the market value: *Earl of Enniskillen* v. *Willis* (3). In *Adams* v. *Dunseath* (4) Law, C., decided that "true" value meant the market value, but all the other members of the Court dissented from this decision. Some of the Sub-Commissioners seemed to think that, taking the full competition rent and deducting from that the fair rent, the difference capitalised at twenty-five years' purchase represented the "true" value. "True" value in sect. 1, sub-sect. 3, is the same as "specified" value, and consists of the tenant's improvements: *Marquis of Headfort's Estate* (5).

(1) See the case reported—[1896] 2 Ir. R. 37.
(2) 27 Ir. L. T. Misc. 63.
(3) 19 Ir. L. T. 25.
(4) 10 L. R. Ir. 109.
(5) M'Dev. L. C. 328

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The only case in which this point was ever directly decided was *Ager* v. *Sealy* (1), and that decision was never considered by the Court of Appeal.

There was no appearance for the tenant.

LORD ASHBOURNE, C. :—

This is a case stated by the Land Commission in which the following question is submitted for our decision:—Is the true value of a tenancy within the meaning of the 1st section of the Land Law Act (Ireland) 1881, restricted to the value of the improvements on a holding made by the tenant or his predecessor in title for which he has not been paid or otherwise compensated by the landlord or his predecessors in title?

As we have heard from the concluding words of Mr. Meredith, the reason why the Land Commission stated the case was because the question was never raised before, and as the seriousness of it was pressed by counsel, they deemed it right not to refuse to state a case. The facts are simple and lie in a narrow compass: the holding is one of twenty-two acres at a rent of £4 15*s.*, and a fair rent was fixed in 1884. The tenant served notice of intention to sell the tenancy, and the landlord served notice of his intention to exercise his right of pre-emption, and having disagreed with the tenant as to the price, served an originating notice to have the true value of the tenancy ascertained. The case came before the Sub-Commission who fixed the true value at the sum of £30. The landlord, considering this sum excessive, appealed, and the case was heard before the Land Commission who affirmed the order of the Sub-Commission. The argument addressed to them was substantially the same as that which we have heard. We have nothing whatever to say to the smallness of the case, or whether a reasonable figure was measured. We have only to answer the narrow question on the construction of sub-sect. 3 of sect. 1 of the Act of 1881. When the case was heard before the Land Commission, and before us, there was no appearance for the tenant who, it is stated, has gone to America. It is of no importance whether he is in

(1) 27 Ir. L. T. Mis. 63.

Ireland or America; he may have been advised that he would leave the case to its own merits. We have had the benefit of listening to the argument of the landlord's counsel who would ably present any argument on any question entrusted to them. Of course they cannot perform impossibilities; but all they can do is to try to answer the difficulties in the way of argument. What is the 1st section? "The tenant for the time being of every holding may sell his tenancy for the best price to be got for the same." The section says "the tenant" may sell without qualification, and then follow conditions under which this right is to be exercised: "on receiving such notice the landlord may purchase the tenancy for such sum as may be agreed upon, or in the event of disagreement may be ascertained by the Court to be the true value thereof." Upon that the contention is raised that where no improvements have been made by the tenant the landlord is entitled to exercise his right of pre-emption and go into possession paying nothing, because the tenant is entitled only to a sum equivalent to the true value of the improvements. There is no scope for the Court. The one question it is urged for the landlord when he is serving the pre-emption notice is—Has the tenant made any improvements? If the answer is, Yes, then what is the value of improvements? and if that is fixed, that is the amount. But if he has made no improvements, or done nothing to make the holding valuable, there is no price to be paid by the landlord. If it is a pigsty or some small thing which the tenant has erected, the landlord may enter on paying the value of the pigsty. But the claim of the tenant is subject also to this qualification, which Mr. Cherry admitted, that, if the improvement is not suitable to the holding, the landlord would be entitled to claim the improvement without paying anything for it, even if it were a mansion-house. If the improvement was unsuitable to the holding it might be ignored, no matter how valuable, and the landlord might enter for nothing. These are grave contentions, but they have never been urged during the fifteen years that the Act has been in existence, although the different provisions of the statute have been keenly discussed and argued by the most powerful intellects in the profession. It would be certainly strange that where we find at the commencement of section 1 that every tenant can sell

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CURNEEN, *Tenant;* TOTTENHAM, *Landlord.*

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for the best price that can be got, we should be asked to find in a few lines lower down, that the statute intended to provide that if there were no improvements, then the price would be nothing.

Suppose there was a grazing holding, where from the nature of the holding there might be no improvements, without any neglect on the part of the tenant, is the landlord to be entitled to acquire that for nothing? If that is the construction of the Act of Parliament, the draftsman of the Act has been very unhappy in stating the meaning, because the Act might have been drafted in a totally different way, and plainly said that if no improvements were made, the landlord might go into possession by paying nothing. Of course it may well be said, that no blot is a blot till it is hit, but it is startling that it has never before been suggested. I am told that that statement is subject to modification and that O'Hagan, J., had considered this question in the case of *The Marquis of Headfort's Estate* (1). Anyone who read his judgment would be surprised that that argument has been suggested for it, and the judgment I have just heard read, delivered by Bewley, J., in the Court below, has quite displaced it. Mr. Justice Bewley states that he examined the files of the proceedings in that case, and found that the Land Commission fixed the specified value at a sum not depending directly on the value of the tenant's improvements. The only case that can be held to be a case where the topic was brought forward in its simplicity is the case of *Ager* v. *Sealy* (2) reported in the miscellaneous part of the Law Times Reports for 1893, p. 63. It was decided by Mr. Trench, Q.C., the legal Sub-Commissioner, a very able lawyer, who delivered a very careful and well expressed judgment. This question was raised before him and was entirely displaced by his answer. It does not appear that this contention was ever seriously raised before as a matter of serious argument or contention, save on this one occasion. It next came before the Land Commission in the present case, and they came to the conclusion that the contention was untenable. So far as I can gather from the closing words of his judgment, the novelty of it occurred to Bewley, J. The question was reserved for the decision of the Court of Appeal on that ground. We have heard

(1) M'D. L. Cas. 328. (2) 27 Ir. L. T. 63.

it argued, and we have no doubt as to the answer we should give to it, and that is in the negative.

FITZ GIBBON, L.J.:—

I am almost afraid to say anything in this case, lest I should seem to suggest that I think the question arguable. I think it very likely that the landlord desired to have a question put which would bring the principle upon which the true value was actually fixed under review, and it may even be surmised that, in the present instance, the price ascertained as "the true value" is very much the same as the price would be to a stranger, but we cannot go into that matter at all, and, upon the question which has been stated, the appellant's contention is absolutely without foundation. That contention is, that the sum which the Land Commission is bound to ascertain as "the true value" of "the tenancy," under the Act of 1881, section 1, sub-sect. 3 is, by law, to be measured at the same amount of money, and no more, which the tenant would be entitled to get under the Act of 1870, as compensation for the improvements effected by himself or his predecessors in title, if he was quitting the holding. Such a construction would at once deprive the tenants of a vast number of holdings of any real or effective power of sale, for no one can sell for money to a purchaser a thing which another person can claim to take from him for nothing, or for a nominal price. Furthermore, the appellant ignores, and excludes from the interest of the tenant, the amount of the compensation which the landlord would be liable to pay if he disturbed the tenant in his holding. It is truly said that the landlord has not disturbed this tenant. But he claims to get his holding all the same, on the same terms as if he had disturbed him, and if "the tenancy" continues for the purpose of being transferred to the landlord, it would be a contradiction in terms to say that the landlord may claim for nothing the very same thing which the tenant could sell for a large sum, and which the landlord could not otherwise acquire without paying compensation for disturbance. In substance, the compensation for disturbance is just as much included in the tenant's interest, as is the compensation for improvements.

Mr. Meredith asks us to hold that attempting to sell the hold-

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ing, which the Act makes saleable, is the same as quitting it voluntarily. If the tenant sold the tenancy to a purchaser, other than the landlord, the price would plainly be enhanced by the fact that compensation would be payable to the purchaser for disturbance, yet it is contended that the "true value," when the tenant attempts to sell, is *nil* if the landlord exercises his right to purchase. It has been held in *Farrelly* v. *Waller* (1), that if the tenant once serves notice on the landlord of his intention to sell, and the landlord thereupon declares his intention to purchase, the tenant cannot withdraw his notice, but becomes irrevocably bound to give the tenancy to the landlord for "the true value" as "ascertained by the Court," *i.e.*—if the appellant is right—for nothing, in every case in which no compensation for improvements would be payable. In *Adams* v. *Dunseath* (2) the Judges were unanimous in holding that the compensation for improvements is not necessarily to be measured at the full increase of the letting value consequent upon the execution of them, but only upon so much of that increase as, having regard to the interest of both landlord and tenant, fairly belongs to the tenant. But again, take the case, put by the Lord Chancellor, of improvements executed by the tenant, which have cost a large sum, and have greatly enhanced the price of the holding, but for which the landlord would not be liable to pay compensation, if the tenant quitted the holding, upon the ground that they were not "suitable" to it. According to the appellant's contention, if the tenant attempted to sell such a holding, the landlord could claim, say a mansion-house, for nothing, because the tenant could not compel him to pay compensation for it, if he were surrendering instead of selling it.

The tenant is not to be taken as voluntarily quitting, and putting an end to a tenancy when he desires to keep the holding still in existence and to sell and assign it to another; and when he sells he is entitled to receive either the market price, or the true value, according as the purchaser is a stranger, or is the landlord. But the thing to be priced in the one case is the same thing which is to be valued in the other. The distinction between the price to

(1) 28 L. R. Ir. 122. (2) 10 L. R. Ir. 109.

a stranger and the true value to the landlord is, in my judgment, very well discussed by Mr. Trench in *Ager* v. *Sealy* (1) where he defines the "true value" to be what a thoroughly solvent and prudent man would give for the holding, intending to make the rent out of it, and a fair profit besides on his capital expended. It seems to me that the relation between the true value which the landlord must pay, and the full price which the tenant might get in the open market, is very similar to that which exists between the "fair rent" which the Land Commission is bound to fix, and the "competition rent" which the landlord is no longer at liberty to exact.

BARRY, L.J. :—

After the judgments of the Lord Chancellor and FitzGibbon, L.J., I do not intend to go at length into the case, but simply to express my concurrence in the conclusion at which they have arrived, and at which I arrived at a very early stage of the argument. Once Mr. Meredith and Mr. Cherry had to argue that the tenant was entitled to enjoy the right of free sale, and yet was in no better position than if he had surrendered his holding, but rather worse, their proposition was absolutely unarguable. It would be a reversal of what was said to be a great benefit for the tenant.

WALKER, L.J. :—

The contention on behalf of the landlord here would really be an abrogation of the 1st section of the Land Law Act of 1881. That section provides that the tenant for the time being of every holding may sell his tenancy subject to conditions which are stated. He must give to the landlord the prescribed notice of his intention to sell his tenancy. Then the landlord may exercise his right of pre-emption for such sum as may be agreed upon, or in the event of disagreement may be ascertained by the Court to be the true value. The subject-matter the tenant can sell is the tenancy. The Act of 1881, and section 4 of the Act of 1870, draw a distinction between improvements and the tenancy. Again, in section 8, sub-section 4, of the Act of 1881, improve-

(1) 27 Ir. L. T. 63.

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ments are kept separate from the tenancy itself. It is an absurdity to suppose that though in every case the tenant can sell his tenancy, he yet must give it to the landlord for nothing when he has not executed improvements; and that in every such case the true value must be nothing.

Solicitor for the landlord: *A. Stubbs.*

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BOYD, TENANT; TREDENICK, LANDLORD (1).

Landlord and tenant—Sub-division of holding—Separate holding—Right to have fair rent fixed—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *sect.* 2; *sect.* 20, *sub-sect.* 1.

J. M., a tenant from year to year of a holding, to which the Land Act of 1881 applied, sold in 1887, with the permission of the landlord's agent, a part of the holding, consisting of 14 acres. The purchaser's name was entered in the landlord's books as tenant of the 14 acres he had bought, at an apportioned rent of £3. There was no consent in writing by the landlord to the sub-division of the original holding:—

Held, (1) that the landlord was estopped from alleging that the 14 acres did not form a separate holding; and (2) that the present tenancy in the 14 acres subsisting at the time of the sale had not been affected by the acts of acceptance, admission, or transfer, constituting the purchaser a tenant; and that the order of the Sub-Commission fixing the fair rent should be affirmed.

THIS case, which was heard at Strabane on the 23rd October, 1895, now appeared in the list for judgment (2).

The facts and question for decision are stated in the judgment of Bewley, J.

BEWLEY, J.:—

Two questions of importance and difficulty arise in this case. In and prior to the year 1887, Mr. John Morrow was tenant from

(1) Before BEWLEY, J., and FITZ GERALD, Q.C., Commissioner.

(2) At the hearing in Strabane *D. S. Henry* appeared for the landlord. *Wm. Wilson,* solicitor, appeared for the tenant.

year to year of a holding on Mr. W. R. Tredenick's estate, at the yearly rent of £31 4*s.* 7*d.* The tenancy was a present tenancy, to which the Land Act of 1881 applied, but a judicial rent had not been fixed. In the year 1887 Mr. John Morrow, who had got into difficulties, applied to Mr. Barton, the agent of the estate, for permission to sell a part of this holding, containing about 14 acres statute measure, at an apportioned rent of £3; and after some discussion Mr. Barton gave his consent. The 14 acre lot was put up for sale by auction as a distinct holding, for which a rent of £3 a-year was payable, and was purchased by Daniel Boyd, the tenant in this case, for a sum of £50. The purchaser in the usual course went to the Estate Office, and was accepted as tenant by Mr. Barton, and had his name entered in the books as tenant of the 14 acres he had bought, at a rent of £3 per annum. From that time to the present he has been given receipts by Mr. Barton in his own name, as tenant of the holding in this case, at the yearly rent which had been so arranged. It appears also that as it was found that Mr. John Morrow, by dividing the original holding into small portions, could get a larger sum from his interest, he was allowed by Mr. Barton, acting for the landlord, to subdivide the residue of the holding at apportioned rents, and that these parts were similarly sold by auction, and are now held in severalty by the purchasers, who pay the rents stipulated to Mr. Barton, and are treated by him as tenants of distinct holdings.

Daniel Boyd having served an originating notice to have a fair rent fixed, the case came on for hearing before a Sub-Commission, and no objection was raised as to the *status* of the tenant. On the 28th June, 1894, an order was made by the Sub-Commission fixing the judicial rent at £2 6*s.*, and on the 24th August, 1894, notice of rehearing was served on behalf of the landlord, alleging as the ground for prosecuting the rehearing, that the rent fixed should be increased. However, when the case came before us at Strabane, on the 27th February, 1895, counsel for the landlord raised two questions involving the right of the tenant to institute proceedings to have a fair rent fixed; and as the tenant and his solicitor were quite unprepared to meet the objections taken the case stood over until the last sittings

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at Strabane, when the facts I have already mentioned were proved.

BOYD, *Tenant*; TREDENICK, *Landlord.*

Bewley, J.

The questions raised on the part of the landlord are:—(1) That the lands comprised in the originating notice are only *part* of a holding; and (2) that even if the lands are a holding, the tenancy is not a present tenancy. If a partition is made of a leasehold interest or tenancy from year to year, without the concurrence of the landlord, he can treat the tenancy, the holding, and the rent, as if they were still undivided; but if, on the other hand, he has been a party to a valid legal partition of a holding, and to an apportionment of the rent payable thereout, it appears to me that each part of the lands held in severalty will thenceforth be a *holding* within the meaning of the Land Acts, *i.e.*, "a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy" (section 57 of Land Law (Ireland) Act, 1881).

In the present case a difficulty that at first sight seems formidable, is raised by the provisions of the 2nd section of the Land Act of 1881. That section enacts that, "the tenant from year to year, of a tenancy to which this Act applies, shall not without the consent of the landlord in writing, subdivide his holding or sublet the same or any part thereof." The tenancy of Mr. John Morrow was a tenancy from year to year to which the Act applies, and admittedly no consent in writing of the landlord to the subdivision has been obtained. But can the landlord under the circumstances put forward an objection to the subdivision grounded on the absence of any consent in writing? If Mr. Barton were the landlord he would, in my opinion, be plainly estopped from relying on any such contention. As expressed in the decision in the House of Lords in *Cairncross* v. *Lorimer* (1) "it is a universal law that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained—he cannot

(1) 3 Macq. H. L. Cas. 829.

question the legality of the act he had so sanctioned—to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct." Mr. Barton consented to the subdivision of the original holding by Mr. James Morrow, and to the sale of the 14 acre lot as a distinct holding subject to a rent of £3 per annum, and by his acts and conduct he induced Daniel Boyd, the tenant in this case, to pay the purchase money of £50, and to incur liabilities that he would never have assumed had he believed that the lands sold were only part of a holding. Therefore Mr. Barton, I think, could not be listened to if he attempted to make any objection to the fixing of a fair rent grounded on the absence of a consent in writing. But the landlord has adopted Mr. Barton's acts, and for the last seven or eight years has taken separate rents from the several tenants of the divided holding. Instead of one insolvent tenant of the larger holding, he has elected to accept three or more solvent tenants of the subdivided parts: and in my opinion he cannot now allege that the 14 acre lot, in the occupation of Daniel Boyd, is not a separate holding.

The second question, however, has still to be considered:—"Is the tenancy a present or future tenancy?" The tenancy subsisting prior to the sale in 1887 was undoubtedly a present tenancy, and if the subdivision or partition had been carried out by deed I think that no question as to the creation of a new tenancy could arise. If a leasehold interest or a tenancy from year to year is partitioned by a deed to which the landlord is a party, the original estate or interest of the lessee or tenant is divided, and the persons taking the partitioned parts of the lands hold under the lease or original contract of tenancy, and not by some tenancy then for the first time created.

In the present case there was no assignment by deed by Mr. James Morrow to Daniel Boyd of the interest of the former in the 14 acres. Daniel Boyd paid his purchase money, got his name entered as tenant in the estate books, went into possession of the lands, and paid the rent; and prior to the passing of the Land Act of 1881 such a transaction would have operated as a surrender by operation of law, to the landlord, of the old tenancy in the 14 acres, and the creation of a new tenancy in Daniel Boyd. But by sect. 20, sub-sect. 1, of the Land Act of 1881, "the surrender to

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the landlord of a tenancy for the purpose of the acceptance or admission of a tenant, or otherwise by way of transfer to a tenant shall not be deemed to be a determination of the tenancy." Therefore the present tenancy in the 14 acre lot subsisting at the time of the sale has not been affected by the acts of acceptance, admission, or transfer constituting Daniel Boyd a tenant; and as he is the tenant of a present tenancy of a holding to which the Land Act of 1881 applies, he is entitled to have a fair rent fixed. The order of the Sub-Commission fixing it at £2 6*s.* will accordingly be affirmed.

Solicitor for the tenant: *William Wilson.*
Solicitors for the landlord: *Dane & Todd.*

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Jan. 15.

REG. (CLEELAND) *v.* THE PHARMACEUTICAL SOCIETY OF IRELAND (1).

Pharmacy Acts (Ireland), 1875, 1890 (38 & 39 *Vict. c.* 57; 53 & 54 *Vict. c.* 48)—*Apprenticeship—Apprenticeship to limited Company carrying on business of pharmacists — "Firm of legally qualified pharmaceutical chemists"—"Firm"—"Person"—Statute—Regulations having, when duly approved of, the effect of statute*—Ultra vires.

The Pharmacy (Ireland) Act, 1875, which created the Pharmaceutical Society of Ireland, gives power to the council of that body to make regulations in regard to the examination of candidates, and generally "for all such other matters as may be necessary for the due execution of this Act." By section 17, "all regulations made under the authority of this Act," when approved by the Lord Lieutenant and Privy Council, and laid before Parliament, become "of the like force and effect as if they had been enacted in this Act." The Act then provides that examinations shall be held at which "all persons desirous of being registered as pharmaceutical chemists under the Act" may present themselves at such times and in such manner as may be prescribed by such regulations; and provides that every person who shall be duly examined in accordance with the provisions of the Act, and shall be certified by the examiners as qualified, shall be entitled to be registered under the Act as

(1) Before O'BRIEN, JOHNSON, HOLMES, and GIBSON, JJ.

a pharmaceutical chemist. The council made regulations, which were duly approved and laid before Parliament, requiring that candidates for the qualifying examination should produce a statutory declaration, signed by a pharmaceutical chemist, that such candidate had served as apprentice or assistant for four years "with and in the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member." These regulations also required a similar statutory declaration to be made by the candidate.

C. served for more than four years as apprentice of a limited Company carrying on business as pharmaceutical chemists. Of the eleven members of this Company two only, T. G. and another, were registered pharmaceutical chemists, the business being managed and carried on by T. G. Both T. G. and C. made statutory declarations stating that C. had served for the requisite period as apprentice with and in the sole employ of the Company, describing the same as a firm of legally qualified pharmaceutical chemists. The council having refused to admit C. to examination, on the ground that these declarations were insufficient and invalid, C. obtained a conditional order for *mandamus:*

Held, that the order must be discharged, for, assuming (as had been assumed in the argument) that the regulations were *intra vires*, "Firm of legally qualified pharmaceutical chemists" meant "firm consisting of individuals legally qualified as such"; and that therefore the declarations were not and could not be sufficient.

Sed quære, per O'Brien, Holmes, and Gibson, JJ., whether the regulations in question were not *ultra vires.*

MANDAMUS. Motion to make absolute a conditional order for a writ of *mandamus*, directed to the Council of the Pharmaceutical Society of Ireland, commanding them to admit the applicant, Robert H. Cleeland, to the next ensuing examination necessary to qualify him to be registered as a pharmaceutical chemist.

The applicant had been, in 1884, apprenticed to Richard Pring, of Belfast, a pharmaceutical chemist, carrying on business as "Grattan & Co." Shortly afterwards the business was turned into a limited liability Company, under the same name. The applicant served six years' apprenticeship with the Company, and a further period of five years as assistant. The Company consisted of eleven members, two only of whom, Mr. Robert Greene and another, were registered pharmaceutical chemists. This member, Mr. Robert Greene, personally managed and superintended the business. In 1895 the applicant, being desirous to present himself for the qualifying examination for pharmaceutical

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chemists, sent in the following statutory declaration, required by the regulations of the Society :—

"I, Robert Henry Cleeland, residing, &c., . . . hereby declare that I have completed with Robert Greene, a pharmaceutical chemist, and a member of the firm of Grattan & Co., Limited, and in the employment of Grattan & Co., Limited, having its registered office at Belfast, aforesaid, which is a firm of legally qualified pharmaceutical chemists, a full term of six years ending the 1st day of January, 1890, as apprentice, and a further term of five years ending the 1st day of January, 1895, as assistant; and I further declare that I believe the said firm to be legally qualified to keep open shop, and was keeping open shop, for the sale of poisons and compounding of medical prescriptions at said place during the term aforesaid referred to; and I further declare that I was in the sole employment of said firm, and was *bona fide* employed during the business day. Dated this 19th September, 1895. (Signed), ROBERT HY. CLEELAND."

A statutory declaration was also made in similar terms by Mr. Robert Greene (1).

The Council of the Society refused to receive these declarations, or to admit the candidate to examination, on the ground that they were insufficient or invalid, and required that the applicant and his employer should make declarations, similar to the above, but containing, as a further description of "firm," the words "of which I believe each member to be legally qualified to keep open shop" (2).

The applicant in his affidavit further stated that he had been admitted to and had passed the preliminary examination of the Society in the year 1889, and had attended the Society's lectures and paid the fees required by them. Mr. Greene, in an affidavit made by him, stated that two other apprentices of the same firm had been allowed to enter for and had passed the qualifying examination, and had been registered as pharmaceutical chemists under the Act, no question or objection being raised, the certificates in their cases being in the same form as those to which objection was now made.

(1) This is set out in the judgment of Mr. Justice Johnson, at page 375.

(2) This was in accordance with a form which was stated to have been adopted by the council in the year 1893, and which apparently was modelled, with considerable alterations, on Schedule Form C of the Act of 1890, which applied to registered chemists and druggists.

Under the Pharmacy Act (Ireland), 1875 (38 & 39 Vict. c. 57), the Council of the Pharmaceutical Society, which was thereby created, were invested with powers of making regulations with respect to certain matters,—section 16, sub-sect. 2, providing for regulations with respect to "the examination of persons desirous of being registered as pharmaceutical chemists," and sub-sect. 8 for regulations "generally for all such other matters as may be necessary for the due execution of this Act"—the section then proceeding to enact that the Council might from time to time alter or revoke such regulations, or make new ones. Section 17, after providing that all such regulations made under the authority of the Act, must be approved of by the Lord Lieutenant and Privy Council, and must be laid before Parliament, then states that "all such regulations when so approved shall be of the like force and effect as if they had been enacted in this Act." Section 21 provides that for the purpose of ascertaining the qualification of persons desirous of keeping open shop for the sale of poisons, &c., the Council shall cause examinations to be held at such times and in such manner as may be prescribed by regulations made in pursuance of the Act; and that "all persons desirous of being registered as pharmaceutical chemists under this Act may at any such examination present themselves;" and prescribes certain subjects for examination. Section 22 provides that "every person who shall be duly examined in accordance with the provisions of this Act, and who shall be certified by the examiners to be qualified to act as a pharmaceutical chemist . . . shall . . . be entitled to be registered under this Act as a pharmaceutical chemist."

Regulation III., which was made and duly approved of, and laid before the Houses of Parliament, provides:—"Candidates for the license who have not, previous to the 1st January, 1884, passed the preliminary examination of this Society, or such examination as is equivalent thereto, shall be required to produce—(*a*) A statutory declaration signed by a pharmaceutical chemist, a registered chemist and druggist of the Pharmaceutical Society of Great Britain, or an apothecary, keeping open shop, stating that such candidate has served a *bona fide* engagement for a term of four years . . . as apprentice or assistant with and in

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the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member." By Regulation VIII. (1893), "it shall be an instruction to such committee to satisfy themselves that the statutory declarations granted guarantee a *bona fide* engagement in the regular work of a pharmacy during the period;" and by Regulation XIII., after 1st January, 1893, "each candidate must accompany his application with a statutory declaration made and signed by the applicant, in addition to that required from his employer, that he has served a term as apprentice or assistant, as required by Regulation III."

Campbell, Q.C. (*R. C. K. Wilson* with him), for the applicant.

The objection of the defendants is that this is not a "firm of legally qualified pharmaceutical chemists," because every member of the firm does not happen to be a registered pharmaceutical chemist under the Act. If that contention is right then every firm, or Company, in which there is a partner, even a dormant partner, who is not a registered pharmaceutical chemist, would have no right to carry on the business of pharmaceutical chemists. We contend that under the Act of 1875 (38 & 39 Vict., c. 57), as under the English Pharmacy Act of 1868, Companies or firms cannot be registered; that the provisions of the Act were intended only to apply to individuals, as individuals alone could be examined and be registered, and alone could actually sell poisons under the Act, or be proceeded against for disobedience to its provisions. The Act of 1875 deals throughout with persons, that is, individuals, and even in sect. 32, which makes provision for carrying on business in case of death, the enactment is confined to the case of a single individual chemist. That section says that "upon the death of any person registered under the Act" as a chemist, or etc., "actually in business at the time of his death, it shall be lawful" for his personal representative to continue such business "if and so long only as such business shall be *bona fide* conducted by a duly qualified assistant," *i.e.*, a registered pharmaceutical chemist and druggist. Thus this section leaves unprovided for the case of the death of a partner, or of a

member of a firm. A similar contention to the present was unsuccessfully put forward, under the English Act of 1868 in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (1) where it was held that throughout the English Act, except in sect. 17 (sale of poisons) the word *person* did not include corporations so as to make a Company liable to the penalty for selling, or compounding poisons, etc., under sects. 1 and 15. The Act of 1875, which for the present purposes may be taken as identical with the English Act of 1868, contemplated two things: the registration of persons as pharmaceutical chemists, and secondly, the registration of persons dealing as registered chemists and druggists. The latter class is now governed by the provisions of the amending Act of 1890.

The declarations made by the applicant, and by Mr. Greene, one of his employers, satisfy the statute, and satisfy the regulations made by the Society; the further declaration which the council have required to be made in this case is in a form which has not been authorized by any regulation or been approved of in the manner required by the Act. The phrase, firm, "of which each member is entitled to keep open shop," is a gloss, an interpretation of the Society's own, upon the earlier form, an alteration made to suit the objects of the present crusade against limited Companies. The earlier form, in accordance with the regulations, permitted, and properly permitted, a member of a firm of pharmaceutical chemists, if he himself was registered as a pharmaceutical chemist, to make the necessary declaration. Grattan & Co., of whom Greene was a member, was, we submit, "a firm of legally qualified pharmaceutical chemists"; and furthermore, Greene, by being a member of the firm, cannot be held to lose his individual rights as a registered pharmaceutical chemist, and was entitled to sign the declaration. [GIBSON, J. Do you suggest that Regulation III. is *ultra vires?*] No, for it is provided in the Act that these regulations, when approved of and laid before Parliament are to have the force and effect of a statute. But we have complied with the regulation. Grattan & Co. are a firm of legally qualified pharmaceutical chemists. This appears on the face of the English and the Irish Acts, for neither

(1) 5 App. Cas. 857.

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interfered with such firms or Companies or required any qualification in their case, for the good reason that the public is sufficiently protected by the provision that all actual business must be done by a properly qualified person, that any firm carrying on this business must have a person registered as a pharmaceutical chemist under the Act, either a member of the firm or some other person, to manage and directly superintend the compounding and sale of poisons. This is further borne out by *The Pharmaceutical Society* v. *London and Provincial Supply Company* (1). In no section of the Act can *person* mean corporation, and certainly ever since 1875 to the present, corporations have been carrying on business as chemists without interference. "Firm" only means the name or signature under which a trade or business is carried on. In the English Act, and in the same way in the Irish, it is the individual who is aimed at, no qualification for the reasons given being required in the case of firms. There is no definition of "person" in the Act of 1875, and the Interpretation Act, 1889 (52 & 53 Vict. c. 63, sect. 19), by which "the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporated," only applies to statutes passed after 1889, and therefore cannot affect the case. The preamble of the Act of 1875 makes it still more clear that it was with individuals only that the Act was intended to deal; and that the evil which it was designed to remove was the want of qualified pharmacists throughout the country. The preamble, though repealed by the Statute Law Revision Act of 1892, may still be referred to in explanation of the policy of the Act.

The Pharmacy Act of 1890 (53 & 54 Vict., c. 48) in its 17th section recognises the right of corporations to keep open shop. It says: "Any person or persons lawfully keeping open shop . . . shall personally manage and conduct such shop . . . or shall employ . . . as an assistant or manager in such shop a duly qualified pharmaceutical chemist." This shows that Companies could lawfully keep open shop for the sale of poisons, etc. The section then proceeds to enact that "such person or persons

(1) 5 App. Cas. 857.

lawfully keeping open shop as aforesaid," shall be held to be the retailers, so as to be liable to penalties. The object of this section was to meet two difficulties: first, the case of Companies who had no properly qualified manager; and secondly, the case of Companies who sought to shelter themselves from liability behind their manager or assistant, contending that the actual seller alone could be made liable. The section shows, however, that Companies can lawfully keep open shop.

The applicant has been serving for eleven years as apprentice and as assistant. He was admitted without any question to the preliminary examination; the Society or their officers might have, and should have, warned him, and others in his position, that they would refuse to allow them to enter for the qualifying examination; instead of which it is only after the candidate's apprenticeship is complete that the objection is raised based on a retrospective regulation. Without raising the question of whether the regulations are *ultra vires* or not, we submit that, on the other point, we are entitled to the writ; but do not wish to be taken as admitting that these regulations are *intra vires*, and think it right to point out that the Act of 1875 only gives the effect of statute to such regulations as are made in execution of the purposes of the Act.

Gordon, Q.C., and *Day*, for the Society:—

It has not been contended, and it is not necessary, therefore, now to argue that these regulations are properly made and binding, but the 10th section of the Act of 1890 puts the question of the validity of the regulation as to apprenticeship beyond doubt, for it expressly recognizes the rule as to apprenticeship (1). The only question is whether "a firm of legally qualified pharmaceutical chemists" can mean anything but a firm, each of whose members is legally qualified and registered under the Act as a pharmaceutical chemist. *Firm* is not the same as *Limited Company*; the latter continues to exist whatever changes may take place in its list of members. *Firm* is generally used as meaning a partnership, and ceases to exist on the death of any

(1) In regard to chemists and druggists.

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member; it is a body of persons, joining themselves together for the purposes of some trade.

The decision of the House of Lords, in *The Pharmaceutical Society* v. *London, etc. Supply Association* (1) was merely that a body of persons, incorporate or unincorporate, could not be proceeded against for penalties under certain sections of the Act of 1868. It did not decide that a Company was "legally qualified" to carry on the trade, but that there was no provision for them in the Act—that they were outside the Act altogether. The Irish Act of 1875 is framed in the same way, and gives them no legal qualification, while the Amending Act of 1890, sections 10 and 17, expressly makes it illegal, as we submit, for a corporation to keep open shop, and provides means for preventing the evil which the earlier Act, as construed by the House of Lords, was inadequate to check. The regulation hits at what must be acknowledged to be a serious mischief—the difficulty of giving to an apprentice a proper education in a large establishment in which every sort of trade is carried on. The new form does not enlarge the earlier one in any way, but merely puts its meaning in plainer terms, for "firm of legally qualified pharmaceutical chemists" can mean nothing but "firm of which each member is a legally qualified chemist."

R. C. K. Wilson, in reply.

Cur. adv. vult.

1896. Jan. 15.

O'BRIEN, J.:—

In this case an application has been made for a *mandamus* in order to overcome the objection of a body known as the Pharmaceutical Society of Ireland to the admission of a candidate for examination, on the ground that he had served an apprenticeship, not to an individually qualified person, but in the establishment of a limited Company, including qualified persons, but not all qualified—an objection which, if good, must have the effect of a severe restriction upon trade, as rendering it impossible for Companies to carry on the sale of drugs, except consisting of individuals all qualified, or by means of qualified assistants. There can be no

(1) 5 App. Cas. 857.

doubt a great evil to be checked existed, chiefly in England, in the excessive increase of chemists' shops, multiplying with infective rapidity under the stimulus of great gain from the sale of valueless materials of mysterious virtues, and ministering to the infirmities, delusions, the vanities and gullibility of the population, and sometimes to vicious and criminal tendencies, with all the dangers to health and life from ignorance and charlatanism and negligence. In so wide a field it is impossible but that some profession or class should seek and discern the means of making the promotion of objects of social utility the means of advancing private interests. And this very common kind of accord between public reforms and private emolument which is the parent of perfect legislation, gave rise to the Pharmacy Act of 1875, which established the Pharmaceutical Society of Ireland, and was the first step in the creation of a very strict monopoly in the sale of drugs, the bonds of which the body have lost no occasion of tightening, as we know by the notices of the legal war carried on by them.

The 21st section of that Act directed an examination to be held for the purpose of ascertaining the qualifications of persons desiring to keep shop for the retailing, dispensing, and compounding of poisons and medical prescriptions, or of being registered as pharmaceutical chemists. For this examination all persons whatever were at liberty to present themselves, without any inquiry as to their antecedents or course of previous instruction; and in the same section the time and manner of holding the examinations were required to be prescribed by regulations made in pursuance of the Act, while the subjects of examination were expressly specified in the statute. The 16th section gave power, subject to the provisions of the Act, to make regulations for the several matters enumerated, one of which is the examination of persons desirous of being registered as pharmaceutical chemists, and the fees to be charged for such examination and registration, and generally for all such other matters as were necessary for the due execution of the Act. Having regard to the fact that there was no restriction in the 21st section as to the class who were to be admissible to the examination—that the regulations were to be "subject to the provisions of the Act"—that the fees were a matter connected with the actual examination itself, and that the

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regulations mentioned in the 21st section and the subjects directed were conversant with the examination alone—I take it as absolutely certain that there was no power in the body to make apprenticeship of any kind a condition of the examination or registration. However, the 17th section required the regulations to be approved of by the Privy Council, and afterwards to be laid before Parliament, and declared that, when so approved, which must mean both by the Privy Council and Parliament—though the term is not used concerning the latter—they should be of like force and effect as if they were enacted in the Act. Under their assumed power, the Council of the Society made a regulation in the year 1887 that candidates who had not passed a certain preliminary examination previous to the year 1884, should, as one of the conditions of the examination produce a statutory declaration, signed by a pharmaceutical chemist, a registered chemist and druggist of the Pharmaceutical Society of Great Britain, or an apothecary, stating that the candidate had served for four years as an apprentice or assistant with and in the sole employment of such pharmaceutical chemist, registered chemist and druggist of the Society of Great Britain, or apothecary, *or of a firm of legally qualified pharmaceutical chemists*, registered chemists and druggists of the said Society of Great Britain, or apothecaries, of which the person signing the declaration was a member. This regulation, on which the objection to the candidate in the present instance was founded, being made, as I conceive, clearly in excess of the authority given by the statute, brings us face to face with the important question which was raised in the reported case of the *Institute of Patent Agents* v. *Lockwood* (1) as to what is the legal effect of bye-laws or regulations having been laid before Parliament, and whether they are legalised so absolutely as to prevent any objection being made in a Court of law that they are *ultra vires*. In that case all the Lords agreed that the rule in question—which was one imposing fees—was *intra vires*, so that it was not necessary to the determination of the appeal to decide the other point, but nevertheless it was decided. It certainly is somewhat alarming that it should be in the power of any body of persons, by means of an

(1) [1894] A. C. 347.

obscure and unnoticed formality, at the suggestion, it may be, of private interest, to smuggle through Parliament illegal regulations, affecting the rights of the public, and to invest them with the force of law; and if we admit the answer given by Lord Herschell in his judgment, that the regulations in that case were made by a public authority, namely, the Board of Trade, in which the law would be supposed to place confidence, yet this argument must be confined to the question whether the rules ought to be considered *intra vires*, and yet the more general question as to their effect assumes that in the instance under consideration the authority was transgressed; for, if the regulation were *intra vires*, the question could not exist, and there does not appear to be any legal ground on which the presumption of confidence, though contrary to the fact, claimed for the Board of Trade, if admissible as an argument on the larger question, could be withdrawn from such a body as the Pharmaceutical Society, or could result in a distinction as to the clause that the regulations should have the same force as if they were enacted in the Act, making it applicable to one case and not in the other. However, if the decision of the supreme tribunal on the second question had left the matter open to discussion, I would have considered, in accordance with the view of Lord Morris, that the object of laying the regulations before Parliament was sufficiently satisfied by the power of simply and directly annulling them if they were wrong, and so putting them out of existence altogether, and removing them out of the sphere of discussion as to whether they were legal or not; and as to the argument used by Lord Herschell, that, if they were contrary to the Act itself, that was not different from the case where contradictory provisions were found in the same statute, yet that argument hardly meets the point that the power to make the regulations is given expressly subject to the provisions of the Act, and that the last clause could not, by a fiction, extinguish time—that, though they were in the same company in the statute, the Court was not precluded from taking notice that they did not come there together—in other words, that "the provisions of the Act" were in existence before the rules, and were inconsistent with them. But the case in the House of Lords is not distinguishable on any principle that I can see, and therefore, of course,

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it settles the question as to the effect of a clause exactly the same in terms.

However, the matter does not rest merely on decision, for it is clear that a suspicion was entertained that the Society were not quite on safe ground in their supposed authority to make the regulation as to apprenticeship; and this was, no doubt, the reason that the amending Act of 1890, by section 10, made express provision for apprenticeship in defining the class who should be entitled to present themselves for examination, and thus destroyed the general right of any person to do so under the earlier Act. This Act is to be read together with the Act of 1875, under which the rule was made, and must be taken to be a legislative recognitition of the rule concerning apprenticeship, as well as a positive enactment with which candidates must comply. The only difference between the section of the Act of 1890 and the rule is in the addition of "Firm of Pharmaceutical Chemists," which was for the benefit of candidates, and would obviously be covered by the power, if apprenticeship were at all to be required.

On the interpretation of the clause in the rule itself, "Firm of Pharmaceutical Chemists," we have an indication of the policy of the law in the Act which was the first institution of a diploma for druggists in Ireland—the statute of the Irish Parliament, referred to by Mr. Justice Johnson(1)—by which the Apothecaries' Hall was established, and which contained a recital of the mischiefs that happened from the ignorance and unskilfulness of persons engaged in compounding medicines, and for remedy of those evils provided a system of examination and apprenticeship; and I suppose no one could doubt that the latter was necessary, and that no kind of examination could take the place of actual practice and skill in the manipulation of subtle and almost impalpable materials, depending for their use on the greatest nicety and exactness in the manner of compounding. As to the words themselves they are alone sufficient to decide the matter. It is impossible by any strain or twist to evade their obvious meaning. "Firm of Pharmaceutical Chemists," following the mention of individual pharmaceutical chemists, must mean firm of persons who are pharma-

(1) 31 Geo. 3, c. 34 (Ir.).

ceutical chemists. The words must be changed, and the policy of the Act must be changed to make it mean firm of persons, some of whom are pharmaceutical chemists, or a Company that includes such chemists. "Firm" cannot have in the section the same meaning as the word from which it is derived, and which in its mercantile origin, means signature—the name by which the person trading is called.

I am therefore compelled to come to the conclusion on all grounds that we cannot assist the applicant by granting a *mandamus*.

JOHNSON, J.:—

In modern times the Ante-Union Apothecaries Act, 1791 (31 Geo. 3, c. 34 (Ireland)), was found insufficient in many parts of Ireland for the wants of the public, which required more numerous establishments for the sale of medicines and compounding of prescriptions. In 1875, therefore, Parliament enacted the Irish Pharmacy Act (38 & 39 Vict. c. 57), incorporating a Pharmaceutical Society, and making provisions for its council, officers, proceedings, and regulations, and for forming and keeping a register of duly qualified persons. Section 16 empowers the council to make regulations for, *inter alia* (by sub-sects. 2 and 3), the examination of persons desirous of being registered as pharmaceutical chemists, or chemists and druggists, under the Act . . . such regulations to be approved by the Lord Lieutenant and Privy Council, and laid before Parliament within twenty-one days, if sitting, and, if not sitting, then within twenty-one days after the commencement of the then next session; and "all such regulations when so approved shall be of the like force and effect as if they had been enacted in this Act."

It was suggested rather than argued that the regulation, on the construction of which the Court is now to pronounce judgment, was *ultra vires*. In my opinion this Court is not competent to entertain, much less decide on any such consideration. In the statute which the House of Lords had under their notice in *The Institute of Patent Agents* v. *Lockwood* (1), it was provided (sect.

(1) [1894] A. C. 347.

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10, sub-sect. 3) that general rules made under that sub-section "shall, subject as is hereinafter mentioned, be of the same effect as if they were contained in this Act, and shall be judicially noticed;" and it was held (Lord Morris dissenting) that rules made under that provision were as effectual as if they were part of the statute. The regulations of 1887, now before this Court, were, as and when prescribed, approved by the Lord Lieutenant and Privy Council, laid before Parliament, and not interfered with by Parliament. They are therefore "of the like force and effect as if they had been enacted in the statute."

The Irish Pharmacy Act, 1875, section 21, provides that the council shall cause examinations of persons desirous to be registered to be held at and in such times and manner as may be prescribed by "regulations made in pursuance of the Act." One of these regulations—Regulation III. sub-sect. (*a*)—requires that a candidate for admission to examination for qualification to be registered as a pharmaceutical chemist shall, *inter alia*, produce a statutory declaration, signed by a pharmaceutical chemist, registered chemist and druggist, or apothecary, keeping open shop, that the candidate has served (as specified therein) "as apprentice or assistant with and in the sole employment of such pharmaceutical chemist, registered chemist and druggist, or apothecary . . . or of a firm of legally qualified pharmaceutical chemists, registered chemists and druggists, or apothecaries, of which" the person so signing "is a member."

On the 1st January, 1884, Cleeland was apprenticed to Pring, a pharmaceutical chemist, carrying on business in Belfast under the style of Grattan & Co., which subsequently became a limited liability Company. Cleeland continued his apprenticeship with the limited Company for six years, which brings us to 1890. He then became an assistant in the employment of this Company for five years, which brings us to 1895. He never was in any other employment. He paid the prescribed fees, and was admitted to and passed the preliminary examination as prescribed by the regulations of the Council of the Pharmaceutical Society; and now, having fulfilled a *bona fide* engagement of service far exceeding the prescribed period, he asks the council to admit him to examination for qualification to be registered as a pharmaceutical

chemist. He tendered the prescribed fees, and he produced the following declaration:—

"I, Thomas Greene, residing at 205, Lorne-terrace, Belfast, in the county of Down, pharmaceutical chemist, hereby declare that Robert Henry Cleeland has completed with me, and in the employment of the firm of Grattan & Co., Limited, having its registered office at Belfast aforesaid, of which I am a member, *and which is a firm of legally qualified pharmaceutical chemists*, a full term of six years, ending the 1st day of January, 1890, as apprentice, and a further term of five years, ending the 1st day of January, 1895, as assistant; and I further declare that the said firm kept open shop for the sale of poisons and compounding of medical prescriptions at said place during said periods, and that the said Robert Henry Cleeland spent the business day in our employment. Dated this 19th day of September, 1895. (Signed,) THOMAS GREENE."

The Council of the Pharmaceutical Society refuse to admit Mr. Cleeland to examination on the grounds that this limited Company is not a firm of legally qualified pharmaceutical chemists, and that the declaration (which is skilfully worded) does not comply with their regulation; and he now calls on this Court to compel the council by *mandamus* to examine him.

The declaration does not state, nor could it with truth state, that Cleeland has served "with and in the sole employment of" Mr. Greene, the pharmaceutical chemist who signed the declaration, "or of a firm of legally qualified pharmaceutical chemists" . . . "of which he is a member." And this is the principal cause shown by the council of the Society against the conditional order for *mandamus* obtained by Cleeland.

The net question for decision therefore, in my opinion, is simply the construction of Regulation III., sub-sect. (*a*). It appears by the affidavits that this limited Company is not registered. It consists of eleven persons—three ladies, a clergyman, five male persons of no specified occupation, a registered pharmaceutical chemist whose interest in the concern is one share, and Mr. Greene, a registered pharmaceutical chemist and the manager of this limited Company, which, in his declaration produced by the applicant, he states is a firm of legally qualified pharmaceutical chemists.

The regulation in the earlier part deals with a declaration

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signed by an individual person who is a pharmaceutical chemist, &c.; and in the later part with a declaration signed by a member of a firm (meaning, I am disposed to think, a partnership) consisting of individual persons, each of whom is a legally qualified pharmaceutical chemist, &c., and of which the individual signing the declaration is a member. It does not contemplate "a legally qualified firm;" there is no such thing in the statute or in the regulations, even assuming that a limited liability Company as such is a firm within the meaning of the regulation, which I am not called upon now to decide, and as to which therefore I give no opinion.

This is a very hard case. The applicant seems to have been misled by having been admitted to pass the preliminary examination. Had this objection been then taken, there might have been sufficient time between that and the present for him to have duly qualified himself; and I make no doubt the council will see their way out of the difficulty in this exceptional case. But the Pharmaceutical Society contest the matter on general principle, and I think their contention is right.

In my opinion the conditional order ought to be discharged on the ground that the applicant did not produce a statutory declaration required by the regulation, signed by a pharmaceutical chemist, &c., stating that the candidate had served the prescribed period "with and in the sole employment of such pharmaceutical chemist, &c., or of a firm of legally qualified pharmaceutical chemists," &c., "of which" the person making the declaration "is a member."

HOLMES, J.:—

In Ireland, before 1875, while anyone was at liberty to sell drugs by wholesale or retail, the only persons who could legally compound medical prescriptions were Licentiates of the Apothecaries' Hall. At least this was supposed to be the effect of an Act of the Irish Parliament, passed in 1791, a rambling and confused piece of legislation, the construction of which is not always obvious. The gentlemen accredited by the Apothecaries' Hall were doubtless good pharmacists, but they were something more. They received an excellent medical education, and were

often as well able to treat disease themselves as to prepare the remedies prescribed by others. They were in fact general practitioners of the healing art, and their status as such was expressly recognised by the Medical Act. Under these circumstances, it was not unnatural for them to cultivate this branch of their profession to the detriment of the other; and the result was that in many parts of the country there was considerable difficulty in having physicians' prescriptions compounded. The Pharmacy Act (Ireland) 1875, was passed to remedy this state of things. The preamble, now removed from the Statute Book by the inscrutable action of the revisers of the Statute Law, shows that the object of the Legislature was not to diminish but to increase the number of pharmaceutical chemists, to open not to close the door. It also shows that this object was to be carried out by giving the right to keep open shop for the dispensing and compounding of prescriptions to all persons who might be found on examination to possess a competent practical knowledge of pharmaceutical and general chemistry, and other branches of useful learning. Accordingly, the Act creates a corporation with the name of the Pharmaceutical Society of Ireland, and makes provision for the appointment of a President, Vice-President, and Council. The 21st section then enacts:—"For the purpose of ascertaining the qualification of persons desirous of keeping open shop for the retailing, dispensing, or compounding poisons or medical prescriptions, and being registered as pharmaceutical chemists . . . the said council shall cause examinations to be held at such times, and in such manner as may be prescribed by regulations made in pursuance of this Act; and the said council shall appoint examiners to conduct the same . . . All persons desirous of being registered as pharmaceutical chemists under this Act may at any such examination present themselves for examination, and they shall be examined with respect to their knowledge" of certain specified subjects; "and the examiners appointed by the council are hereby empowered after such examinations respectively, to grant or refuse to such persons as in their discretion may seem fit, certificates of competent knowledge and qualification and skill to be registered as pharmaceutical chemists."

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The 22nd section provides that every person who shall be duly examined in accordance with the provisions of the Act, and who shall be certified by the examiners as qualified to act as a pharmaceutical chemist, shall, upon giving to the registrar reasonable proof thereof, and upon payment of the proper fees and charges, be entitled to be registered.

It will be observed that in the portion of the statute which I have quoted it is contemplated that the council should prescribe by regulations the time and manner of the examinations; and the 16th section gives express authority to the council for this purpose.

The question which the Court is now asked to decide arises upon the construction of a regulation which purports to have been made by virtue of this power, and which, having been approved of by the Lord Lieutenant in Council, and duly gazetted, is now, in the words of the 17th section, "of the like force and effect as if it had been enacted in" the Act of 1875. I cannot conceive that it was the intention of the Legislature to enable the Council of the Pharmaceutical Society to vary or repeal by regulations any of the provisions of the statute under which the regulations are made. The 16th section declares expressly that the council is to exercise the power therein conferred "subject to the provisions of this Act." There is in the 17th section a direction that the regulations shall be laid before both Houses of Parliament within twenty-one days after the same shall be made, if Parliament be sitting at such time, or if Parliament be not sitting, within twenty-one days after the commencement of the next session. But this can only be intended for the information of the Legislature, for there is nothing to be found in this statute similar to what is contained in some Acts conferring quasi-legislative functions upon a judicial or executive body, by which either of the Houses may within a specified period disapprove of or annul the regulation by resolution.

The several matters, with respect to which the Council might make regulations, are specified in the Act of 1875 with great minuteness; and what was obviously contemplated was the settlement of supplementary details which might be appropriately left in the hands of a body of experts after the leading principles had been declared in the statute.

I have been led to make these observations by the fact that the regulation before the Court is not supplementary to, but absolutely contradictory of the provisions of the Act. "All persons desirous of being registered as pharmaceutical chemists may, at any such examination, present themselves for examination," says the Act. "No person shall present himself at such examination unless he shall have served an engagement for a term of five years as apprentice or assistant with, and in the sole employment of, a pharmaceutical chemist," says the regulation. "Candidature open to all," say the representatives of the people, suffering inconvenience from the want of pharmacists. "Candidates strictly confined to a privileged few," say the representatives of the class that receives the apprentices' fees and the profits by monopoly. I do not wish, however, to be misunderstood. I offer no opinion as to whether Parliament or the Council is right. Too much value is sometimes attached to examinations; and in any case manipulation and practical experience must count for much in preparing medicine. Moreover, mere acquaintance with the actual appearance of the drugs, and familiarity with the varying handwriting and Latinity of physicians are of some importance. I am not aware whether it is possible to test this kind of knowledge by examination. It may be, or it may not. All I say is, that Parliament and the Council differ. Perhaps the former has changed its mind, for I find, in the amending Act of 1890, while no change was made in the case of pharmaceutical chemists, four years' service is required as a qualification for chemists and druggists, who, I understand, are also obliged to pass a minor examination.

During the discussion of this case, it occurred to some of the members of the Court that the question of the regulation being *ultra vires* might arise; but they were not, I think, aware—I, for one, certainly was not—of the direct contradiction between it and the statute. Mr. Campbell, at an early stage, stated that he did not intend to raise this point. At a later period, however, he said he did not abandon it, and intimated that he might wish to discuss it elsewhere. I understand his difficulty. He represents a young man who, having served a term of four years in one of the best pharmaceutical establishments in

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the country, seeks to be permitted to earn a livelihood, but who, I presume, does not wish to come into unnecessary collision with an influential corporation. Mr. Campbell, however, cannot expect us to decide the point in his favour without argument. To do so would be unfair both to his client and to the Court. There is authority on the subject. I have read *The Institute of Patent Agents* v. *Lockwood* (1), which does not, however, seem to govern the present case. The repugnancy between the statute and the regulation appears to me to be so clear that I do not understand how others have overlooked it, and I fear that I have overlooked something myself. I have even sought for an explanation in the circumstances connected with the passing of the Act of 1875. I find that, in 1874, a private legislator introduced, in the House of Commons, an Irish Pharmacy Bill, not unlike the Bill that became law the following year. The first Bill was referred to a Select Committee. A great want of pharmacists in Ireland was admitted, somewhat reluctantly, by the representatives of the Apothecaries' Hall, and proved by other witnesses, including the late Sir Dominic Corrigan, who gave some remarkable instances of the difficulty attending the compounding of medical prescriptions in some parts of the country. The Committee had a draft Bill before them, prepared on behalf of the Apothecaries' Hall, which, in addition to the examination test, prescribed, as a qualification a three years' apprenticeship or service. This was evidently looked on unfavourably by, at least some, if not all the Committee; and it appeared that up to that time no such qualification was required in Great Britain. No special reference is made to this subject in the Report; but the recommendations are confined to an examination test, and the Government measure, introduced in the following session, was passed on the same lines. These matters, of course, can give no help on the question of law, but they illustrate the possible consequences of Parliament entrusting a body, not directly responsible to itself, with a quasi-legislative authority, and suggests the necessity of keeping such authority, when given, under control of a legal tribunal. I have referred to this matter at some length; for although for the reasons already

(1) [1894] A. C. 347.

given I do not feel myself at liberty to decide the question involved, it is undoubtedly of great importance and possibly of great difficulty.

The point argued by Mr. Campbell is a small one in comparison. The applicant has served a *bona fide* engagement for a term of four years as apprentice or assistant with and in the sole employment of a limited Company, carrying on the business of pharmaceutical chemists. Such a Company cannot be registered as pharmaceutical chemists under the Act of 1875; but it is argued that without registration it can legally carry on the business; and *The Pharmaceutical Society* v. *London and Provincial Supply Association, Limited* (1) is relied on in support of this proposition. Although the English and Irish law is not identical, this view is possibly correct; and certainly Mr. Gordon did not succeed in satisfying me that the 17th section of the Act of 1890 has made any change in this respect. I do not desire, however, to express a strong opinion upon a matter which we are told will be the subject of litigation in this Court with a party much more interested in its determination than the present applicant, against whom I am obliged to decide, even if this point is assumed in his favour.

The regulation requires a statutory declaration which the applicant has not obtained, and which cannot be made truthfully. The declaration is to state that he is in the sole employment either of the pharmaceutical chemist who signs it—which is not the fact, as he is in the employment of the Company—or of a firm of legally qualified pharmaceutical chemists. Mr. Campbell asks us to read these words as including a joint stock Company entitled to carry on the business of pharmaceutical chemists. But, assuming that the word *firm* includes a corporate body, the "legally qualified pharmaceutical chemists" must mean the individuals that compose the corporate body; and, admittedly, these are not all legally qualified. The case is a hard one—so hard as to tempt a Court to make bad law. Indeed the applicant's construction becomes, with the aid of a certain amount of metaphysical reasoning, not impossible; but, if I were to adopt it, I should feel that I was acting

(1) 5 App. Cas. 857.

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from a wish to do something more than to give a plain and honest meaning to the language of a regulation which, if *intra vires*, must be construed as a section of the statute. For these reasons I am against the applicant upon the question that has been argued by his counsel.

And now I hope I shall be pardoned if I add to my judgment a few words not strictly judicial. I have a great respect for the Council of the Pharmaceutical Society; and I am sure that they are sincerely anxious to uphold the standard of a profession which is of great value to the country. The time has gone by for leaving the public to the mercy of the chemist's errand-boy of "Pickwick," with his confused ideas about oxalic acid and Epsom salts, laudanum and syrup of senna. There is nothing unreasonable in requiring from the future pharmacists practical experience gained by apprenticeship or service; and if statutory authority for this purpose is needed, there would probably be little difficulty in obtaining it. But the case of the applicant is unaffected by these considerations. He has served for four years in a pharmaceutical establishment of the highest character. Two other apprentices or assistants in precisely the same position have been admitted to the examination. If the council has the power (as we are told it has) irrespective of the regulation in question to allow him to be examined, this is surely a fit case for its exercise. The controversy between the limited Company and the individual, if it is to be fought out, can be determined without preventing a young man from getting his living in that state of life for which he has tried to qualify himself. But may I not ask why should the controversy be fought out at all? This contest with limited Companies is, I think, hardly consistent with the dignity or even the interests of the Pharmaceutical Society. As far as the public is concerned, there is no reason why a joint stock Company should not carry on the business of pharmacists provided it has a properly qualified manager: and an apprentice or assistant of such a Company, who has given his sole attention to the pharmaceutical department, is just as likely to be well trained as any other. There are probably several apprentices and assistants of this kind in Ireland at present. Surely, it would be prudent for the Council of the Society to reconsider the matter before they engage in a crusade

against bodies that for more than twenty years have been permitted in Great Britain and Ireland to carry on business, often to the convenience, and never, as far as I am aware, to the injury of the public.

GIBSON, J. :—

If the regulations are to be construed as if enacted in the body of the statute, the only question for decision is the meaning of the phrase "a firm of legally qualified pharmaceutical chemists." Counsel for the applicant contended that these words must be read in the light of the House of Lords' decision (1), which in their view established that a limited Company could be a firm of legally qualified pharmaceutical chemists.

That case—which was regarded in all the Courts as one of considerable difficulty—seems to me to decide only that a corporation as a legal entity is outside all the provisions of the English Pharmacy Act save section 17. That such a body could not be made subject to penalties by no means involves that they are qualified under the Act as pharmaceutical chemists; and indeed Lord Selborne expressly states in terms that they cannot be so qualified. What is struck at is sale by individuals. A corporation can only act and sell through individuals. Any employee who acts for them, or describes himself as pharmaceutical chemist, must possess the statutory qualification. In the opinion of Lord Blackburn (at page 872) a corporation knowingly selling by an unqualified person might be within the penal clauses, on the principle that *qui facit per alium facit per se*. Lord Justice Thesiger, in the Court of Appeal, thought that, though the Company, as an artificial person, might not be liable, the individual members would be liable (2). Lord Justice Bramwell did not disagree with this (3). If Lord Justice Thesiger's view be correct, there has been a violation of the Act in many instances. There is certainly nothing in that case to show that an unincorporated firm could carry on business or describe themselves as pharmaceutical chemists without all the members of such firm being legally qualified. Without the statutory qualification they could not keep open shop, or call themselves pharmaceutical

(1) 5 App. Cas. 857. (2) 5 Q. B. D. 320. (3) 5 Q. B. D. 315, 316.

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chemists. Nor could they compound or sell by assistants, if they employed assistants, unless the latter possessed the necessary qualification. The special provision contained in section 82, in the event of a pharmaceutical chemist's death, makes this still clearer. If then a private firm could not act as or be styled pharmaceutical chemists unless all were qualified, can a corporation be "a firm of legally qualified pharmaceutical chemists," when not a single member of such corporation might, if Mr. Campbell's view is right, be qualified at all? Of course, for the purpose of Regulation III., one member should be qualified in order to make the statutory declaration; but the question is what is included in the expression "a firm of legally qualified pharmaceutical chemists."

Though it may not be in the abstract illegal for a corporation to take apprentices, it would seem that, in a case like the present, the master himself ought to possess the qualification which he is to impart. It would be a strange anomaly if service with an unqualified master could confer a legal qualification. Accordingly, under the old Apothecaries' Act, unqualified persons were prohibited from taking apprentices, just as much as from practising otherwise. Here the corporation is the master; the person who signs the declaration, whether director or shareholder, is not. A Company like the Stores might carry on many kinds of business as well as pharmacy, and might have branches in many distant localities. It is quite possible that among its shareholders there might be one or two pharmaceutical chemists, and they, if the applicant is right, could make the statutory declaration without even having seen the apprentice. His sole instruction might have been derived from assistants, who, though qualified, would be under no personal and direct duty such as binds the master. It is no answer to this to say that the Society ought itself to be able to discover such an evasion. They are entitled to look to and rely on the master's declaration. Nor is the objection met by the fact that many masters in large business give no personal attention to their apprentices, whose instruction is left to subordinates. In a profession or business requiring learning, the master ought to be qualified, so as to be able to supervise and direct the work of assistants and apprentices alike.

Coming to the regulation itself, the following points seem clear. The statutory declaration must be signed by a man who is to be the master or one of the masters. Such master, though the regulation does not say so, must be a legally qualified person. No other person can be or call himself pharmaceutical chemist. If the service is with a firm of partners, all the members of such firm must be legally qualified. The chemists and druggists spoken of in the same context must be natural persons. Having regard to the context and phraseology of the regulation, can a limited Company, which as such is entirely outside the Pharmacy Act, be such a firm as the regulation contemplates? I think that the firm must be composed of flesh and blood masters personally qualified, with a personal obligation or duty to the apprentice or assistant. A corporation, which, though not disqualified is unqualified, cannot be such a firm.

I abstain from pronouncing any opinion in reference to section 17 of the Act of 1890, as it does not directly affect the question before us. It would be strange if "person" there included corporation; and the words "personally manage" are not certainly appropriate to a corporation.

Up to this I have proceeded on the basis that the regulation is to be read as if it were a section of the Act; and on that assumption it was not suggested that there was any contradiction between any section of the Act and the regulation. At the close of the argument, however, Mr. Campbell stated that, without discussing the point, he was not to be taken as admitting that the regulation was valid or *intra vires*. The matter is not free from difficulty. If there was any contradiction between the Act and the regulations, the latter must give way. The regulation certainly adds something to sect. 22, which, taken as it stands, contemplates success at examination as the only condition to admission. If the regulation, however, were a substantive section, it could be read perhaps so as to harmonise with section 22 as imposing a supplemental condition. Having regard to the reasoning of Lord Herschell in *Lockwood's Case* (1) and to the Act of 1890 (53 & 54 Vict. c. 48, sect. 10) which recognises apprenticeship in the case of druggists, I would

(1) [1894] A. C. 360.

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find it difficult to invalidate regulations now in existence so many years without question; and as the case has been argued only on the construction, and not on the legality of the regulation, I need not discuss the point further. I share, however, the apprehension expressed by Mr. Justice Vaughan Williams in a late case as to the danger of construing legislation of this character as excluding the doctrine of *ultra vires*. It may be that the reasoning in *Lockwood's Case* (1) is limited to a skeleton Act, and does not apply to such a statute as is here before the Court.

Solicitors for applicant: *H. & W. Mahaffy.*
Solicitors for respondents: *Casey & Clay.*

A. E. R. J.

Q. B. Div. 1896.

Feb. 10.

THE PHARMACEUTICAL SOCIETY OF IRELAND *v.* BOYD & CO. (2).

Pharmacy (Ireland) Acts, 1875, 1890 (37 & 38 *Vict. c.* 57, *s.* 30; 53 & 54 *Vict. c.* 48, *s.* 17)—*Company carrying on business of pharmaceutical chemists—"Person"—Body corporate—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 2—"*Contrary intention*"—*Statute.*

The defendants, a limited Company, carrying on business as pharmaceutical chemists, were prosecuted before Justices at Petty Sessions, under section 30 of the Pharmacy (Ireland) Act, 1875, for having compounded and sold medical prescriptions, they not being properly qualified in that behalf. That section provides that "it shall not be lawful for any person" to sell or keep open shop for retailing or compounding poisons or medical prescriptions, unless such person be registered as a pharmaceutical chemist or a chemist and druggist under the Act, and imposes on any person acting in contravention of this provision a penalty of £5. On Case Stated:—

Held—following the decision of the House of Lords in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (5 App. Cas. 857) upon the construction of the corresponding sections of the English Pharmacy Act of 1868 (31 & 32 Vict. c. 121, ss. 1, 15)—that *person* in the Act of 1875 did not include a body corporate, so as to make the defendants liable to the penalty imposed by sect. 30; and *held*, further, that, the contrary intention thus

(1) [1894] A. C. 360. (2) Before O'BRIEN, JOHNSON, and HOLMES, JJ.

appearing on the face of the statute, the provision of the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 2), that, "in the construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . the word *person* shall, unless the contrary intention appears, include a body corporate," was inapplicable.

CASE STATED by Justices, sitting at Lisburn Petty Sessions, upon a complaint heard before them on the 12th September, 1895, at the prosecution of the Pharmaceutical Society of Ireland, against Alexander Boyd & Co., Ltd., of Lisburn, charging that the defendants did "keep open shop for compounding medical prescriptions, and did compound a medical prescription for one A. Downey, of, &c., contrary to the Pharmacy Act (Ireland), 1875 (38 & 39 Vict. c. 57), sect. 30"; they, the defendants, "not being a person properly qualified in that behalf according to law." The defendants were a limited Company, registered under the Companies' Acts, but, as a Company, could not be registered under the Pharmacy (Ireland) Acts as pharmaceutical chemists or chemists and druggists, nor be licentiates of the Apothecaries' Hall, or medical practitioners. They owned a shop in Lisburn, in one part of which they carried on the sale of groceries, while in the other—on the window blinds of which the words "Medical Hall," were printed—they carried on the trade of pharmacists. This department of the shop was in charge of and conducted by a duly qualified and registered pharmaceutical chemist. The formal proofs of the compounding of a medical prescription and sale were given, and the foregoing facts were proved before the Justices, and appeared on the Case Stated. The Justices dismissed the summons, and stated the present Case, on the application of the prosecutors, for the opinion of the Queen's Bench Division. It did not appear whether any of the shareholders of Boyd & Co. were registered pharmaceutical chemists or not.

J. Day (*John Gordon*, *Q.C.*, and *J. H. Campbell*, *Q.C.*, with him), for the prosecutors:—

In the Irish Act of 1791 (31 Geo. 3, c. 34, Ireland) the penalty sections would, we submit, include corporations, and so, before 1875, no person or body of persons, not being licentiates of the Apothecaries' Hall, could compound medical

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prescriptions. [HOLMES, J.: That may have been the generally accepted view of the law, but it is not easy to find any clear foundation for it in the Act of 1791.] Then came the Act of 1875, under sect. 30 of which this prosecution has been brought. The defendants contend that, being a body corporate, the Act of 1875 does not affect them; but, though in the enabling sections of that Act "person" does not, we concede, include body corporate—for the provisions as to examination and registration can only apply to individuals—the 30th section is an enactment in the widest and most general terms, making it unlawful for *any person* to do certain acts, and is, we submit, equally applicable to bodies corporate and to individuals. The presumption is that "person" in a statute does include corporations, and the burden lies on the other side to show that this is not so in the Act in question. The decision in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (1) does not govern the construction of the Irish Act, for the Acts are dissimilar, their policy divergent (see the preambles), the offences created by them different, and the mode of recovery of penalties distinct. Further, the effect of the Interpretation Act, 1889, sect. 2, is to extend, if that be necessary, the meaning of the word "person," to bodies corporate, so as to place the construction of the section now under consideration beyond doubt.

R. C. K. Wilson, and *Ronan Q.C.* (*Meredith, Q.C.*, with them), for the respondents:—

The policy of the Irish Pharmacy Act of 1875 was to assimilate the law in England and Ireland, and to adopt for Ireland the provisions of the English Act of 1868. Sect. 30 of the Irish Act is framed upon sects. 1 and 15 of the Act of 1868, and in its provisions is practically identical with them. No section of the English Act (save sect. 17, which deals with the sale of poisons, and which corresponds to the provision in 33 & 34 Vict. c. 26, s. 2, Ireland) deals with bodies corporate; and, as we submit, no section of the Irish Act of 1875 deals with or affects bodies corporate, or any others than individuals. The decision to this effect

(1) 5 App. Cas. 857.

of the House of Lords, upon the construction of the English Act, in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (1), is a binding decision upon the construction of the Irish Act of 1875. No distinction can be drawn between the two statutes. Though the evil to be remedied may have been different, the substantial policy of both Acts was the same—not to restrict or enlarge in any way a privileged class, but to provide for the requirements of and to protect the public. The penalties are no doubt recoverable in different modes; but this cannot affect the general construction of the two Acts. From the decision in the case before the House of Lords, where it was distinctly laid down that the word "person" in a statute would, unless the contrary intention appeared, include a body corporate, it follows no less on the construction of the Irish than of the English statute that in both the contrary intention does appear; and to distinguish in any way between the two Acts would involve that the intention and effect of the Irish Act was not to approximate the law in both countries, but to create a most vital divergence between the statute law in England and in Ireland, and to take away from limited Companies the right to carry on this business in Ireland, though Companies may legally trade as pharmaceutical chemists in England and Scotland, and though both before and since 1875 Companies have in Ireland carried on this trade with no less efficiency than individual traders, and without any attempt being made to prosecute them for the breach of the law that is now alleged.

Thus the appellants are driven to rely wholly on the effect of sect. 2 of the Interpretation Act of 1889. The penalties under sect. 30 of the Act of 1875 are made recoverable under the Irish Petty Sessions Procedure, and for this reason we are ready to admit that these penalties are "recoverable on summary conviction," and that therefore the language of sect. 2 of the Act of 1889 is applicable if no other objection to its application can be sustained. But can it be said that by this general clause it was intended to make that illegal in Ireland which had been until then legal, and which still continues to be legal in England and in Scotland,

(1) 5 App. Cas. 857.

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where the decision of the House of Lords was followed, in 1887, by the Court of Sessions; and how can it be said, with any regard to the decision and grounds of decision in *The Pharmaceutical Society* v. *London, etc., Supply Association* (1), that the "contrary intention" does not sufficiently appear on the face of the statute to bring the case within the exception of the section?

[O'BRIEN, J., referred to *Reg.* (*Fletcher Moore*) v. *Abbot* (2), and to the English Apothecaries Act of 1815 (55 Geo. 3, c. 194).]

Gordon, Q.C., in reply.

[Counsel also referred to *Reg.* (*Cleeland*) v. *Pharmaceutical Society* (3).]

O'BRIEN, J.:—

The members of the Court, being all agreed in their view, consider, notwithstanding that the case has been justly described as one of much gravity, that it is not necessary to postpone their decision. Speaking for myself, when *Cleeland's Case* (3) was at argument in this Court, I had great doubts whether such a prosecution as the present would not lie; but I had not then read, or had not had an opportunity of reading together, the sections upon which this question arises, namely section 30 of the Irish Act of 1875, and the corresponding sections, 1 and 15, of the English Pharmacy Act of 1868, which appear to have been combined and consolidated into one section in our Act; and, as I have already said during the argument, I do not think that, upon reading these sections, it is possible to entertain any doubt as to their meaning. Whatever the views of the Legislature may have been, and whatever the differences as to the mischief to be removed and as to the enforcement of the remedy in England and in Ireland, it appears to me that all arguments of that kind yield entirely to the predominant one founded on the very words of the statute itself, the sections of the English and Irish Acts admitting of but one construction and being concerned with the same subject-matter, and therefore, of necessity, receiving the same interpretation, whatever the original intention of Parliament

(1) 5 App. Cas. 857. (2) Q. B. D. (Ir.), Jan. 20, 1896. (3) *Supra*, p. 363.

may have been. I certainly do not see the force of Mr. Gordon's argument, in which he draws a distinction between restrictive and enabling legislation. Whether there was in England a class of persons carrying on the business of compounding medicines, whom the Legislature thought too large, and who, it was desirable to declare, should possess certain qualifications in the future, and whether there was in this country a deficiency of persons carrying on the same trade, so that it was advisable to create a larger class than that already in existence; these considerations, so far as I can see, and the application of any distinction between restrictive and enabling legislation, cannot affect the general policy of these Acts, which remains the same, and can make no difference in the construction of these sections. We must, no doubt, always have regard to the antecedent state of the law, in order to see what the mischief was which it was intended to provide against, and then we must construe the terms of the Act of Parliament itself, and not go in further upon the antecedent law than those terms carry us; but, however far those terms do carry us, we must go, whatever ambiguity there may be as to the reasons which are assumed to have brought about the enactments in question.

Looking at the Act of 1875, it is most plain that if it was in the contemplation of the Legislature, before the Interpretation Act of 1889 was passed, to have subjected corporations to penalties for compounding medicines and selling poisons, that object was capable of being attained, and could have been attained by the use of different language. The Legislature could have said: "from and after the passing of this Act no medical prescriptions shall be compounded or poisons sold except by persons who are registered as pharmaceutical chemists under this Act." But that is not what the Act does say. It says, in effect: "No person shall sell or keep open shop for retailing poisons or medical prescriptions, unless such person be registered as a pharmaceutical chemist under this Act"—thus assuming that the person to whom the penalty was to be applicable was capable of qualifying himself by a certain course of education provided by the Act and of being registered under the Act. A corporation could not be included in that description; and I am satisfied that no one

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reading this Act could come to any other conclusion than that "person" does not include corporation. Therefore, apart from the Interpretation Act—or taking that statute into consideration, seeing that a "contrary intention" (which is there saved) most manifestly and distinctly appears—we are forced, by the real test of the terms of the Act of Parliament itself, to hold that section 30 does not apply to corporations; and, for these reasons—though I had at first doubted whether upon the Irish Act we should arrive at the same conclusion as that of the House of Lords in *The Pharmaceutical Society* v. *The London and Provincial Supply Association* (1), upon the sections of the English statute—it now appears that no other conclusion could be arrived at upon either statute, and that the basis of the judgment of Lord Selborne must lend itself equally to the construction of our section. The true expression of the rule of construction is, I think, laid down by Lord Watson, at page 875 of the report, that, whatever the intention of the framers of the Act may have been, the language of the Act itself—for this is the very key to determining the intention—must be adequate for attaining the purpose so intended.

Without going into the many topics that have been discussed in the argument, we think that the penalty cannot be enforced against a corporation, and that the decision of the Justices was right.

JOHNSON, J.:—

I am of the same opinion. Sections 1 and 15 of the English Act (31 & 32 Vict. c. 121) are substantially re-enacted in section 30 of the Irish Act (38 & 39 Vict. c. 57). The House of Lords, in *The Pharmaceutical Society* v. *The London and Provincial Supply Association* (1), ascertained and decided that on the true construction of sections 1 and 15 of the English Act, the word "person" in these sections did not include a body corporate. I therefore think that the word "person" in section 30 of the Irish Act does not, upon the true construction of that section, as interpreted by the decision of the House of Lords, include a body corporate. I

(1) 5 App. Cas. 857.

am also of opinion that the word "person" in section 30 of the Irish Act does not, by virtue of the Interpretation Act, 1889, section 2, include a body corporate, because the "contrary intention," which is contemplated by that section, "appears" by the very terms of the statute itself on its true construction.

HOLMES, J.:—

I concur.

Solicitors for complainants: *Casey & Clay.*
Solicitor for defendants: *F. W. Charley.*

A. E. R. J.

IN THE MATTER OF THE ESTATE OF ANNE SMITHWICK, A VENDOR OF LAND (1).

Land Com. 1896. April 21.

Purchase of Land (Ireland) Acts, 1885 to 1891—Vesting order—Mortgage—Arrears of interest—Statute of Limitations.

A vesting order made by the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891, stops the Statute of Limitations running as from its date, in favour of all persons having charges on the lands in respect of which the vesting order is made.

Arrears of interest directed to be paid on a mortgage for six years next preceding the making of vesting orders affecting the lands subject to the mortgage.

APPLICATION by Henry Lee Venables, the receiver appointed by the Chancery Division of the High Court of Justice of England to receive the principal and interest due on foot of a mortgage for £300 charged upon the lands sold in this matter, that he might be declared entitled to the difference between six years' interest upon the said charge previous to the 25th October, 1895, already allowed, and six years' interest prior to the first vesting order made in this matter, dated the 25th July, 1894, and that his claims against the guarantee deposit should be registered accord-

(1) Before BEWLEY, J.

Land Com. 1896.

In re SMITHWICK'S ESTATE.

ingly. Agreements had been entered into between the landlord and the tenants for the sale to them through the Land Commission of the lands in question. The receiver over the mortgagees' interest when vouching his claim before the Land Commission Examiner, proved that eight years' arrears of interest were due on foot of the mortgage to the 25th October, 1895, and contended that he was entitled to recover arrears of interest from the 25th July, 1888, being six years before the date of the vesting orders made by the Land Commission on the 25th July, 1894. The examiner allowed six years' arrears of interest up to the date of vouching, viz. the 25th October, 1895, without prejudice to any right to further interest the claimant might establish. The present application was then made to Mr. Commissioner Wrench, and as involving a question of law was referred to the Judicial Commissioner.

Molyneux Barton, for the receiver:—

The claim of the receiver was transferred to the purchase money as from the date of the vesting order, and accordingly he is entitled to interest for the six years next before that date. The vesting order had the effect of stopping the Statute of Limitations running, being an order for the benefit of all parties interested in the lands: *Colclough's Estate* (1); *Nixon's Estate* (2); Purchase of Land (Ireland) Act, 1885 (48 & 49 Vict. c. 73), sect. 8; sect. 9, sub.-sect. 5; sect. 10. The Landed Estates Court Act, 1858 (21 & 22 Vict. c. 72), sect. 64, directs the purchase money to be applied in or towards payment of the incumbrances or charges affecting the land.

[Counsel also referred to *In re Bateson's Estate* (3).]

Mr. Tatlow, solicitor, appeared for the vendor, and submitted that the ruling made by the examiner was correct.

BEWLEY, J.:—

The Purchase of Land (Ireland) Act, 1885, in the 9th sect., sub-sect. 5, in express terms, provides that the rights and claims of all persons in respect of the estate sold, or any incumbrance or

(1) 8 Ir. Ch. R. 330.
(2) Ir. R. 9 Eq. 7.
(3) [1895] 2 Ir. R. 559; [1896] 2 Ir. R. 171.

annual charge thereon, shall, from the date of the vesting order, be transferred to the purchase money, and sect. 10 confers on the Land Commission the jurisdiction and powers of the Land Judges as given by certain sections of the Landed Estates Court Act, 1858, including amongst others section 64, which provides that the purchase money shall be applied in or towards payment or satisfaction of the incumbrances or charges affecting the lands sold.

At the time the vesting orders in this case were executed, viz. the 25th July, 1894, the incumbrancers now represented by the applicant were entitled to the principal sum due on foot of their mortgage with six years' arrears of interest, and by virtue of the section referred to this claim was transferred to the purchase money lodged in Court. The right to obtain payment of this claim out of the lands came wholly to an end, while the right to payment out of the moneys representing the lands could not be enforced until the allocation of the funds in this matter, a proceeding over which the applicant had no control. Under these circumstances the running of the Statute of Limitations was, in my opinion, arrested by the vesting orders.

Mr. Barton suggested that the statute was stopped by the *first* of the vesting orders; but each sale is a separate transaction, and it is only as a matter of convenience that the funds arising from a number of sales are allocated together. In the present case, however, all the vesting orders were executed on the same day, and the question does not therefore arise as to whether the suspension of the statute should not be held to have taken effect at different dates, as against different portions of the fund.

I shall declare Mr. Henry Lee Venables as receiver, entitled in respect of the charge No. 5, on the Final Schedule of Incumbrances to the difference between six years' interest on the said charge prior to the 25th October, 1895, already allowed, and six years' interest prior to the date of the vesting orders herein, being the 25th July, 1894, and as also entitled to have his claim against the guarantee deposits herein registered accordingly.

The applicant is entitled to a reasonable sum for the costs of this application.

Solicitors for the receiver: *A. H. Middleton & Son.*

Solicitor for the owner: *A. Tatlow.* T. H. M.

Ex. Div. 1896. April 17.

PARKER, APPELLANT; THE QUEEN (WALSH), RESPONDENT (1).

Licensing Acts—37 & 38 *Vict. c.* 69, *s.* 28—*Public thoroughfare—Navigable arm of the sea*—Bona fide *traveller—Purpose of journey.*

A navigable arm of the sea, though not crossed by a ferry is a public thoroughfare within the meaning of the Licensing Act, Ireland, 1874 (37 & 38 Vict. c. 69), s. 28.

A person is not a *bona fide* traveller within the meaning of the Licensing Acts when the object of the journey is to resort to a licensed public-house for the purpose of drink.

CASE STATED by Justices pursuant to 20 & 21 Vict. c. 43.

At a Petty Sessions holden at Timoleague, in county Cork, on the 18th November, 1895, the defendant was charged in and by a certain summons, for that he being a person duly licensed to sell intoxicating liquors by retail at his licensed premises in Courtmacsherry, in the county of Cork, did at a time prohibited by law, and at a period during which such licensed premises are by law required to be closed, to wit at about 5 p.m. on the 13th October, 1895, unlawfully sell intoxicating liquors, to wit porter, on the said licensed premises against the form of the statute in such case made and provided; and the said parties respectively being then present, the charge was duly heard, and upon such hearing the majority of the Justices adjudged that the defendant be fined 20*s*. Application having been duly made to state and sign a case for the opinion of this Division, the Justices stated and signed a case as follows:—

1. On Sunday, the 13th October, 1895, a messenger from the defendant arrived at the police barrack of Courtmacsherry about 9 o'clock and informed Sergeant Rourke that there were four men from Burrin at the defendant's licensed house in the village of Courtmacsherry, and that the defendant was about to supply

(1) Before ANDREWS and MURPHY, JJ.

them with intoxicating liquor but was waiting till the police came to see it given.

2. Sergeant Rourke with a constable then went to the defendant's house and found there four men, who it was admitted lodged the previous night at a place called Burrin, and who were in the presence of the police supplied with four pints of porter.

3. The defendant was duly licensed for the sale of beer, wine, and spirits.

4. Some short time previous to the 13th October, 1895, the police had informed the defendant that if any persons from Burrin were supplied with intoxicating liquor during the time when by law public-houses were required to be kept closed, the police would prosecute, as Burrin was not three miles from the village of Courtmacsherry, measured by the nearest public thoroughfare, and the defendant stated subsequently, but before the 13th October, 1895, that he had been advised that Burrin exceeded the limit of three miles so measured.

5. The village of Courtmacsherry, in which is situated the defendant's licensed house, is at one side of an arm of the sea, the townland of Burrin at the opposite.

6. Taking the line of measurement along the nearest public-road to any portion of the townland of Burrin, the distance would be five miles, one furlong, but taking a line across the arm of the sea to places where the four men, found in the defendant's licensed house and supplied with intoxicating drink, lodged on the previous night, would be $1\frac{1}{4}$ miles.

7. There is no ferry or public means of transit across the arm of the sea dividing the townland of Burrin from the village of Courtmacsherry.

8. There are a number of small boats owned by private persons lying on the Courtmacsherry side of the sea, which are availed of by the inhabitants of Burrin and other places situated on that side to cross over.

9. The persons supplied with drink, in this case admitted to the police that they crossed the bay in their own boat, of which three of the men who got the drink, J. Brien, J. Whelahan and D. Whelahan, were joint owners. Both complainant and defendant quoted

Ex. Div. 1896.

PARKER, *Appellant;* THE QUEEN, *Respondent.*

the Southampton Case (*Coulbert, Appellant; Troke, Respondent* (1)); the complainant arguing that in this case there was a public pier kept up by the Grand Jury, on each side of the water in question and that the water was open to all, and that that constituted a public thoroughfare within the meaning of the Act. The defendant argued that in the Southampton Case there was a ferry, and that without a ferry there could be no public thoroughfare. Upon the said hearing the majority of the Justices being of opinion on the foregoing facts that the defendant was guilty of a breach of the Licensing Act, the Justices convicted him of selling intoxicating liquor to persons not being *bona fide* travellers, and fined him 20*s.* and 1*s.* costs, and thereupon the judgment of the Court is required as to whether the said Justices were correct in point of law in their determination, or as to what should be done in the premises.

H. D. Conner (with him *Wright, Q.C.*), for the appellant:—

The question turns on the proviso in section 28 of the 37 & 38 Vict. c. 69, which is as follows:—"A person, for the purposes of this Act and the principal Act shall not be deemed to be a *bona fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare." The "nearest public thoroughfare" from Burrin to Courtmacsherry is that by the public road, which makes the distance in excess of three miles. A public thoroughfare must be such a way or passage as is available by all the public, and not one available only by those who are the owners of private boats. If there were a public ferry across the arm of the sea it might be different; but no ferry exists. The facts of the case are similar to those in *Coulbert, Appellant; Troke, Respondent* (1), where it was decided that the arm of the sea at Southampton was a public thoroughfare within the meaning of the similar section in the English Licensing Act, but that case is distinguishable, because there there was an ancient ferry, and a toll charged for crossing.

(1) 1 Q. B. D. 1.

Morphy, for the respondent:—

A public thoroughfare is the same as a public highway. An arm of the sea is a public highway: Hargrave's Tracts, p. 8. In addition it should be observed that there is a public pier erected and maintained by the Grand Jury, showing thereby that it was intended to facilitate public passage across the water. Supposing there was a public-house at the end of a *cul de sac*, which was a public highway, it could not be held that the appellant could not be convicted under this section, because although the *cul de sac* was a public highway it was not necessarily a "public thoroughfare." The case is undistinguishable from *Coulbert, Appellant; Troke, Respondent* (1).

[Counsel also cited *Marshall* v. *The Ulleswater S. N. Co.* (2), and *Penn* v. *Alexander* (3).]

ANDREWS, J.:—

If we entertained any doubt on the question which has been argued we would reserve judgment, but we think the case is a clear one. The sole question which has been argued is whether, upon the true construction of the concluding words in sect. 28 of the Licensing Act (Ir.), 1874 (37 & 38 Vict. c. 69), the water way between Burrin and Courtmacsherry is a "public thoroughfare." If it is, the conviction is right, as the distance from Burrin (where the men who were supplied by the defendant with intoxicating liquor on Sunday, the 13th of October last, lodged during the preceding night) to the defendant's licensed premises in Courtmacsherry (where the liquor was sold to them) is much less than three miles, and therefore in that case these men were not *bona fide* travellers.

Burrin is on one side of a navigable arm of the sea, and Courtmacsherry is on the other side. The public have a paramount right of highway over this navigable channel, which is in fact used for the passage of boats, and was crossed by a boat on the occasion in question by the men whom the defendant supplied with the liquor, and who had a right to use the channel as a highway for the purpose. The existence of a public pier on each side of the channel which is referred to though not formally found as a

(1) 1 Q. B. D. 1. (2) L. R. 7 Q. B. 166. (3) [1893] 1 Q. B. 522.

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fact in the case, but is not denied, would go to show that the channel is actually used as a highway. Irrespective, therefore, of the case of *Coulbert, Appellant; Troke, Respondent* (1), we think it clear that the channel in question is a "public thoroughfare" within the meaning of the 28th section. In that case, which decided that Southampton water was a "public thoroughfare" within the meaning of the corresponding section of the English Licensing Act of 1874 (37 & 38 Vict. c. 49, s. 10) there was an ancient ferry across which has been relied on as distinguishing it from the present case, but the Southampton water was a highway irrespective of the ferry, and there is no question in the present case as to the public not having a right to cross from Burrin to Courtmacsherry. On this ground alone, therefore, we hold that the Justices were correct in point of law in their determination, and that the convictions should be confirmed with costs.

There is another aspect of this case which I do not make a ground of my judgment as the case does not appear to have been stated with reference to it, and the facts found may not, in strictness, be sufficiently full to raise it, but there would seem to be little doubt that the men supplied with liquor by the defendant on the occasion in question were not *bona fide* travellers because they simply came to drink, and did not drink in order to refresh themselves in travelling. Their purpose in coming would appear pretty clearly to have been not to travel, but to drink, and in that case the three mile limit in the 28th section would have no application as has been established by the recent case of *Penn* v. *Alexander* (2) and the authorities therein referred to, and in this view also unless the Justices were satisfied that the defendant truly believed that the men were *bona fide* travellers, and were also satisfied that the defendant took all reasonable precautions to ascertain whether or not they were so, the convictions would have been right.

MURPHY, J.:—

I concur in the judgment of Mr. Justice Andrews. I wish to add that in all cases where this question as to "*bona fide* travellers" comes before magistrates their attention should be called to the decision in the case of *Penn* v. *Alexander* (2). In that case the

(1) 1 Q. B. D. 1. (2) [1893] 1 Q. B. 522.

persons who were supplied with beer on Sunday had come from Northampton to a village called "Little Houghton," three and a-half miles from Northampton. The magistrates found they were not "*bona fide* travellers," and convicted the man who supplied them with beer. On case stated the conviction was held good. Mr. Justice Collins in his judgment, says:—"It is not sufficient to prove that a man has travelled three miles in order to establish that he is a '*bona fide* traveller'; the language of the Act of Parliament is too clear to allow of such a contention being successful. What then is it which is to determine whether travelling three miles makes a man a '*bona fide* traveller'? It must, in my opinion, be the purpose with which he undertook the journey. What was the purpose with which these persons undertook to walk from Northampton to Little Houghton? The circumstances are fully set out in the case, and from those circumstances it is clear that their object was to get beer. In all these cases the test must be the object of the journey. If that object is pleasure or business, a man will be a '*bona fide* traveller,' but if the form of pleasure be to drink beer he will not be, for the 'beer,' and not the travelling, would be the object of his journey."

Lord Coleridge says in his judgment:—"There has been proved to exist in this case a system of going out on Sunday to get beer, which cannot be got at home, . . . that this is a regularly established system which is believed to be within the law, and is at work near every large town. In my opinion, it is not within the law." The judgments of Mr. Justice Collins and Lord Coleridge were agreed with by Mr. Justice Day and Mr. Justice Hawkins.

In the present case the men rowed across to get porter, and for no other object, and even if they had come more than three miles by land or water they were not "*bona fide* travellers."

Solicitors for the appellant: *T. & W. Wright.*
Solicitor for the respondent: *P. Coll.*

J. P. B.

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IRISH LAND COMMISSION *v.* WHITE (1).

April 20, 27. May 6.

Tithe rentcharge—First estate of inheritance—Lease for lives renewable for ever made in 1851—*Payment by owner in fee—Dispossession or discontinuance of receipt—Statute of Limitations.*

An owner in fee-simple, by deed dated the 17th September, 1851, purported to demise certain lands for lives renewable for ever. Notwithstanding this deed the owner in fee paid the tithe rentcharge up to the 1st November, 1886. In an action for subsequent tithe rentcharge against the person entitled to the estate created by the deed of 1851, of which, up to 1886, the owners of the tithe rentcharge had no notice :—

Held, 1st, that the defendant was the owner of the first estate of inheritance in the lands so as to render him liable to pay the tithe rentcharge; 2ndly, that the tithe rentcharge was not barred by any Statute of Limitations.

Adnam v. *Earl of Sandwich* (2 Q. B. D. 485) followed.

Case Stated by the Lord Chief Justice pursuant to 27 & 28 Vict. c. 99.

The case was as follows:—

1. This was an appeal by the plaintiff, from a dismiss on the merits of the County Court Judge of county Limerick, dated 11th June, 1895.

2. The process sought to recover £2 8*s.*, being eight years' tithe rentcharge at 6*s.* a-year payable out of part of the lands of Cappanihane, in the parish of Comohide, barony of Upper Connolloe and county of Limerick.

3. The defendant Edward White holds the lands, subject to the tithe with other lands under a lease dated 17th September, 1851, made between Charles Pearson and Susan Pearson his wife, of the one part, and the defendant of the other part, whereby the lessors demised to the defendant all that and those, part of the town and lands of Cappanihane with others, containing 150 acres, for the lives of the said Edward White, Richard White, first and then only son of the said lessee, and Wm. Fry, and for the natural lives and

(1) Before Andrews and Murphy, JJ.

life of all such other person or persons as should from time to time thereafter be added thereto pursuant to a covenant therein contained subject to the rent of £100; and the said lease shall be deemed to be incorporated with this case, and contained a covenant for perpetual renewal as therein.

4. The said tithe rentcharge of 6*s.* a-year was never paid by the defendant, but was paid by the agents for the lessors in the said lease of 17th September, 1851, up to the 1st November, 1886. At the date of the said lease to the said defendant Edward White, the lessors were owners in fee-simple of the said lands and were liable as such to pay the said tithe rentcharge at the date of the said lease.

5. Plaintiffs' counsel relied on 2 & 3 Wm. 4, c. 119, ss. 7 and 8, 1 & 2 Vict. c. 109, the Renewable Leasehold Conversion Act, 1849 (12 & 13 Vict. c. 105), and the Landlord and Tenant Act, 1860.

6. The defendant admitted that the said lands had been duly charged with the said tithe rentcharge, but contended that plaintiffs' claim was barred by non-payment by the defendant or his predecessor in title or agent on his behalf of the said charge, since the creation of the estate by which the defendant holds said lands. Defendant also contended that such estate was not the first estate of inheritance in said lands.

7. Plaintiffs' counsel admitted that the claim was liable to be barred by non-payment, but contended that payments made up to 1886 were for the use of the defendant and that he was not therefore entitled to rely on the Statute of Limitations.

QUESTIONS.

1. Has Edward White the first estate of inheritance in the said lands, so as to make him liable to pay the said tithe rentcharge?

2. If so, is the said claim barred by the Statute of Limitations, having regard to the payments made as aforesaid up to 1st November, 1886?

W. F. Kenny (with him *Matheson Q.C.*), for the plaintiffs:—

Edward White had the first estate of inheritance and was

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therefore liable for this tithe rentcharge. There was no discontinuance of payment for twelve years, so as to bring the claim within the Statute of Limitations. [Counsel referred to *Irish Land Commission* v. *Grant* (1); *Verschoyle* v. *Perkins* (2); *Adnam* v. *Earl of Sandwich* (3); *Newbould* v. *Smith* (4); 23 & 24 Vict. c. 154, s. 3; 2 & 3 Wm. 4, c. 119, ss. 13 and 14; 3 & 4 Wm. 4, c. 27, ss. 2 and 3; 1 & 2 Vict. c. 109, ss. 7 and 9; R. P. Lim. Act, 1874, ss. 1 and 2; and 12 & 13 Vict. c. 105, s. 19.]

H. D. Conner, contra :—

The perpetual estate of inheritance dealt with in section 7 of 1 & 2 Vict. c. 109, was an estate in existence at the passing of the Act, and although White had an estate of inheritance, it did not come within the section. The claim was barred by the Statute of Limitations. [Counsel referred to *The Commissioners of Church Temporalities* v. *Harrington* (5); *Adams* v. *Alexander* (6); 2 & 3 Wm. 4, c. 119, s. 13; 1 & 2 Vict. c. 109, s. 7; 12 & 13 Vict. c. 105, s. 19; and the Redemption of Rent (Ireland), Act, 1891.]

Cur. adv. vult.

May 6.

ANDREWS, J. :—

This was a case stated under the 35th section of the 27 & 28 Vict. c. 99, by the Lord Chief Justice as Judge of Assize, upon the trial before him, at the last Summer Assizes for the county Limerick, of an appeal by the plaintiffs from a dismiss on the merits by the County Court Judge of a civil bill process which they brought to recover from the defendant £2 8*s*., being eight years' arrears of tithe rentcharge at six shillings a-year, payable out of certain lands in that county which had admittedly become duly charged therewith. The facts are shortly these :—Charles and Susan Pearson, who were owners in fee-simple, by a deed which in form was a lease, dated the 17th September, 1851, purported to demise the lands in question to the defendant for lives renewable for ever. After the execution of this deed the lessors'

(1) 13 L. R. Ir. 478.
(2) 13 Ir. Eq. R. 72.
(3) 2 Q. B. D. 485.
(4) 29 Ch. D. 882.
(5) 11 L. R. Ir. 127.
(6) [1895] 2 Ir. R. 363.

agent continued, as before, to pay the tithe rentcharge in question which he paid up to the 1st November, 1886, when the payment of it ceased. It was never paid by the defendant. Under these circumstances the defendant contended first, that he had not such an estate in the lands as rendered him liable to the payment of the tithe rentcharge; and, secondly, that if he had, the rentcharge was barred under the 2nd and 3rd sections of the statute 3 & 4 Wm. 4, c. 27, which the House of Lords in the case of *The Irish Land Commissioners* v. *Grant* (1) decided tithe rentcharge was capable of being. The plaintiffs contended that the defendant was liable to pay the tithe rentcharge by reason of the estate he acquired under the deed of 17th September, 1851, and that the payments which were made up to 1886 saved the bar of the statute. These are the questions which the Lord Chief Justice reserved by the case stated for the opinion of one of the superior Courts, and which we have now to decide.

As regards the first, lessees for lives renewable for ever holding under leases made after, and not contracted for before, the 16th August, 1832, were not liable to pay the tithe rentcharge, as the 13th section of Stanley's Act (2 & 3 Wm. 4, c. 119) enacted that after its passing in all cases where any lands should be let, set, or demised in Ireland, the lessee or tenant thereof should hold them free from the payment of tithes or composition for tithes, and the Tithe Rentcharge Act of 1838 (1 & 2 Vict. c. 109) (which, by its 7th section made the substituted tithe rentcharge payable by the person having in the lands charged the first estate of inheritance, or other equivalent perpetual estate; and by the 8th section included the estate held under a lease for lives renewable for ever among the equivalent perpetual estates specified therein), enacted by its 9th section that where by the laws then in force any person should be entitled to hold under any lease, or demise the lands thereby demised free from tithes, or composition of tithes, he should not be liable to the payment of the substituted tithe rentcharge.

It seems not improbable that it was owing to these provisions, and the form of the deed of 17th September, 1851, that the lessors'

(1) 10 App. Cas. 14, 26.

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agent continued as he did to pay the tithe rentcharge after the execution of that deed, of which the plaintiffs do not appear to have had notice, and the smallness of the amount of the rentcharge may, to some extent at any rate, account for its having remained unpaid after 1886.

By the 37th section of the Renewable Leasehold Conversion Act of 1849 (12 & 13 Vict. c. 105) it was enacted that every lease of lands renewable for ever made after the passing of that Act by any person competent to convey an estate of inheritance in fee-simple (as the lessors in the deed of 17th September, 1851, were), and not so made under a prior covenant or agreement, should notwithstanding anything therein contained to the contrary *be deemed to be and should operate as* a conveyance to the intended lessee, his heirs, and assigns, for ever, at a fee-farm rent equal to the rent reserved. If the case rested there, as the deed of 1851 vested in the defendant an estate of inheritance in possession which was the first estate of inheritance in the lands, he would on the execution of that deed have become liable to the payment of the tithe rentcharge. He, however, relied on the 19th section of the Leasehold Conversion Act which enacted that nothing in that Act contained should be deemed to affect or alter the existing liability of any party or parties, or of any estate or interest, in respect of the payment, or deduction of rentcharge in lieu of tithe. This did not, in my opinion, exempt the defendant, as he contended it did, from liability to pay the rentcharge after execution of the deed of 1851. If the parties to that deed had prepared it in the form of a conveyance in fee subject to a fee-farm rent it could not be successfully contended that the defendant would not have thereby become liable to pay the rentcharge; and under the 37th section that deed must be deemed to be, and it in fact operated as such a conveyance. After its execution the defendant was the only person who had such an estate in the lands as rendered the owner of it liable to pay the tithe rentcharge. If he was not liable no one else was, and it seems to me impossible to give the 19th section the construction which the defendant contended for. The intention of that section was, in my opinion, to more clearly prevent conversion grants under the Act from altering the existing liability in respect of tithe rentcharge, and I construe the words

"existing liability" to mean the liability existing at the time of the conversion. This protected those lessees who, although holding under leases renewable for ever, were not, under the laws I have referred to, liable to pay tithe rentcharge, from becoming liable to pay it by the conversion under the Act of their existing tenures with tenures in fee, but a deed executed after 1849, in the form of a lease renewable for ever cannot operate as such. It is not a *lease* which is convertible under the Act or converted by the Act. From the instant of its execution it is a conveyance in fee, and can in no sense be regarded as coming within the words "let, set, or demised" in the 13th section of Stanley's Act. In the case of *Verschoyle* v. *Perkins* (1) the Earl of Arran being seized in fee under a grant by patent made to one of his ancestors by King James the Second, with a licence to alien to be held of the grantee in the patent and his heirs, *non obstante* the statute of *Quia Emptores*, conveyed the lands in 1834 to John Perkins and his heirs, reserving a yearly rent, and it was held that no reversion being left in the Earl the lands were not *let, set, or demised*, within the meaning of the 13th section of Stanley's Act, and that therefore the estate of John Perkins was liable to the tithe rentcharge. The Master of the Rolls so decided in that case, although he said there might be tenure; but upon the construction of Stanley's Act he held that the conveyance to John Perkins could not come within the words "let, set, or demised" in the 13th section; and this decision was afterwards affirmed.

The deed of 17th September, 1851, though a conveyance in fee, leaving no reversion in the grantors, would no doubt have been a "lease" under the Landlord and Tenant Act of 1860 (23 & 24 Vict. c. 154, sects. 1 and 3), had it been executed after that Act, but Stanley's Act, which was passed in 1832, could not in any case be construed by the terms of an Act which was passed in 1860, and altered the previously existing law. The recent case of *Adams* v. *Alexander* (2) was relied on for the defendant, but the question in that case had relation solely to the Redemption of Rent (Ireland), Act, 1891, and the judicial opinions which were expressed in favour of holding grantees under the

(1) 13 Ir. Eq. R. 72. (2) [1895] 2 I. R. 363.

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various classes of grants therein referred to entitled to the benefit of that Act cannot in any way assist in the decision of an entirely different case like the present. Upon the first question reserved by the case stated, I am therefore of opinion that, by the deed of the 17th September, 1851, the defendant became the owner of the first estate of inheritance in the lands therein comprised so as to make him liable to pay the tithe rentcharge thereon.

The next question is, whether on the facts stated, this tithe rentcharge was barred by the statute at the time the plaintiffs brought their civil bill action. I think the case of *Adnam* v. *The Earl of Sandwich* (1) is a distinct authority that it was not. Field, J., in delivering the unanimous judgment of the Court in that case said (p. 489), that the legitimate object of all Statutes of Limitation was no doubt to quiet long continued possession, but they all rested on the broad and intelligible principle that persons who had at some anterior time been rightfully entitled to land, or either property or money, had by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity, to which they had in some sense been tacit parties. In that case, as in this, the question arose upon the 2nd and 3rd sections of the 3 & 4 Wm. 4, c. 27, and not upon the 40th section. Under the 3rd section, the plaintiffs' right to bring an action to recover the tithe rentcharge, would have first accrued when the plaintiffs while entitled thereto had been dispossessed of it or had discontinued the receipt of it. There was no dispossession, even assuming that word to be applicable to a rentcharge, and there was no discontinuance of the receipt of the tithe rentcharge until 1886 which is well within the present twelve years period of limitation. Up to 1886 the payments were made as and for the tithe rentcharge, and were received as such, the plaintiffs being, as is not denied, ignorant of the existence of the deed of 17th September, 1851. There was no laches on the plaintiffs' part up to 1886, and until that time they did not sleep upon any right they knew of. This case therefore comes within the first ground on which the

(1) 2 Q. B. D. 485.

case of *Adnam* v. *The Earl of Sandwich* (1), was decided. That decision was in 1877, and I have been unable to find that it has ever been disapproved of. It is referred to as a subsisting authority in the case of *Newbould* v. *Smith* (2) (decided in 1885), and in the last edition (1893),of Shelford's Real Property Statutes, (p. 121). In the present case therefore, following the case of *Adnam* v. *The Earl of Sandwich* (1), I am of opinion that the tithe rentcharge in question is not barred by the statute, and that the plaintiffs are entitled to recover, but of course only six years' arrears.

The terms on which the Lord Chief Justice stated the case leave the plaintiffs liable, on their undertaking to pay the defendant's costs of the case stated, and the argument thereon; but this will not form part of our order, which under the circumstances will not refer to costs, and on receiving our answers to the questions he reserved, the Lord Chief Justice will make his decree on the appeal.

MURPHY, J., concurred.

Solicitor for the plaintiffs: *W. Alexander.*
Solicitor for the defendant: *W. Beauchamp.*

J. P. B.

(1) 2 Q. B. D. 485. (2) 29 Ch. D. 882, 888.

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Nov. 5, 6, 7.

LAWSON *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Estate duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30, *s.* 2)—*Property situate out of the United Kingdom—Foreign mortgages—Legacy Duty Acts, construction of—Implied repeal of earlier by later statute—* 56 *Geo. c.* 56, *s.* 115; 5 & 6 *Vict. c.* 82, *s.* 2.

A testatrix domiciled in Ireland died possessed of mortgages on freehold property situate in the colony of Victoria and in Switzerland.

The Finance Act, 1894, sect. 1, imposes on the property, real or personal, which passes on the death of a person dying after the commencement of the Act, a duty, called "Estate Duty." Section 2 (2) enacts that "property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

56 Geo. 3, c. 56, s. 115 (Ir.), enacts that "the stamp duties from time to time imposed by law upon receipts for legacies or shares or proportions of any estate or effects, shall be deemed and taken to be chargeable and charged, and payable and paid, only in respect of such legacies as shall be payable out of estates and effects in Ireland."

5 & 6 Vict. c. 62, repealed the duties payable in Ireland under 56 Geo. 3, c. 56, and substituted the duties then payable in England under 55 Geo. 3, c. 184.

The Commissioners of Inland Revenue having decided that estate duty was payable in respect of these mortgages, the executors presented a petition under the Finance Act, 1894, to have the question determined by the Court. It was contended on behalf of the executors that estate duty was not payable on two grounds: first, that the mortgages were immoveable property, situate out of the United Kingdom, and therefore not liable to legacy duty before the passing of the Finance Act, 1894; and, secondly, that the mortgages were "estates and effects" out of Ireland, and therefore exempt from duty under 56 Geo. 3, c. 56, s. 115, which was still in force.

It was contended on behalf of the Commissioners, first, that the mortgages were personal or moveable property, and therefore liable to legacy duty; and, secondly, that 56 Geo. c. 56, s. 115, was impliedly repealed by 5 & 6 Vict. c. 82:—

Held, that the contention of the Commissioners on both points was correct, and that estate duty was payable.

PETITION.

This was an appeal by way of petition under the Finance Act, 1894, by the executors of the late Mrs. J. M. Lawson of Dublin, against the decision of the Commissioners of Inland Revenue that estate duty was payable under the above Act upon certain mortgages situate out of the United Kingdom, on the ground that legacy duty would have been payable in respect of them before the passing of the said Act, and that therefore by section 2, sub-sect. 2 of the Act, they were liable to estate duty.

The material facts of the case were stated in the petition of the executors, which was entitled "In the matter of the Finance Act, 1894, and in the matter of the estate duty on the property passing on the death of Jane Margaret Lawson, late of 27, Upper Fitzwilliam-street in the city of Dublin, widow," and were as follows:

The deceased was at the time of her death possessed of property situate out of the United Kingdom, namely a mortgage upon house property in Switzerland and mortgages on lands situate in the colony of Victoria. The above property was mentioned in the affidavit of the petitioners for the Inland Revenue, but they contended that it was not liable to estate duty. The Commissioners of Inland Revenue having notified in writing to the solicitors for the petitioners that they were advised that estate duty was payable, the petitioners being desirous of applying to the Court pursuant to the said Act, delivered to the Commissioners a written statement of the grounds of their appeal pursuant to the Rules of Court made under the said Act. These grounds were as follows:—

1. That the said mortgages were immoveable property situate out of the United Kingdom. 2. That the said mortgage debts were locally situate in Switzerland and Victoria respectively, and could not be considered as mere debts or choses in action apart from the property on which they were secured, or regarded as moveable property. 3. That the said mortgages and mortgage debts were property situate out of the United Kingdom, and that no legacy or succession duty would have been payable in respect thereof prior to the passing of the Finance Act, 1894, and that therefore no estate duty was payable in respect thereof under the said Act. 4. That in or about the year 1892 possession was taken

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on behalf of the mortgagee of the premises comprised in one of the Victorian mortgages, namely a mortgage for £600, and that the deceased as mortgagee was by her agent and receiver in possession of the rents and profits thereof at the date of her death, and that no estate duty was payable under the said Act in respect of the moneys secured by the said mortgage for £600.

The said Commissioners notified in writing to the solicitors for the petitioners that they had determined to maintain in the whole their claim for estate duty in respect of the said property, on the ground that the said mortgages were personal property in respect of which under the law in force before the passing of the Finance Act, 1894, legacy duty was payable or would be so payable but for the relationship of the person to whom it passed, and as such should be included under section 2 (2) of the said Act, as property passing on the death of the deceased.

The Commissioners filed an answer, admitting the above facts, and stating that at the time of her death the deceased was domiciled in Ireland, and repeating the grounds relied on by them as above stated.

The petition having been set down for hearing, now came on before the full Court.

Samuels, Q. C. (with him, *Frederick Fleming*), for the petitioners :—

First, the mortgages are immoveable property situated out of the United Kingdom, and are not liable to legacy duty, which attaches only to moveable property situate abroad. That a mortgage is immoveable property appears from Story's Conflict of Laws, s. 447; Westlake's Private International Law, ss. 148, 150 ; Dicey on Domicil, p. 38. In *Freke* v. *Lord Carbery* (1) the passage from Story referred to is cited with approval, as it is also in *In the Goods of Gentili* (2), where it is pointed out that the distinction is between things moveable and immoveable and not between things real and personal. It was held in these two cases that leasehold property, though a chattel real, and personal estate according to English law, is immoveable property, and follows the *lex loci rei sitæ*, and

(1) L. R. 16 Eq. 467. (2) Ir. R. 9 Eq. 541.

not the law of the domicil of the deceased. The passage in Hanson on Succession Duty, p. 160, to the effect that a mortgage debt is to be considered as assessable in the domicil of the mortgagee on the ground that the debt is to be considered apart from the security itself, is not supported by authority, and cannot apply to the mortgages situate out of the United Kingdom. In Trevor on Succession Duty, p, 60, the opinion is expressed that the liability to legacy duty of immoveable property such as leasehold property and real estate *pur autre vie* and of legacies charged upon or payable out of real estate is not affected by domicil. See also Soward on the Finance Act, 1894, p. 10. If the mortgagee dies, although the money goes to his executor, it is the charge on the land that vests in him, and not the mere debt. The land is given as security for the money. *Attorney-General* v. *Lord Sudeley* (1) shows that the mortgages here are assets in the colony of Victoria. *Walsh* v. *The Queen* (2) is in favour of the petitioners. The contention of the Crown here, as there, is that the personal obligation of the debtor is what is to be looked to in considering whether legacy duty is payable. That case goes the whole length of our contention, namely, that the mortgage is to be considered as assets where the mortgaged lands are situate, and that what is to be regarded is the immoveable security and not the mere personal obligation of the mortgagor.

That a mortgage is an interest in land is further shown by the decisions in England that a mortgage cannot be disposed of in mortmain in that country. See *Cornford* v. *Elliott* (3), where it was held that a mortgage was an interest in land under 9 Geo. 2, c. 36, s. 3, which could not be given by will to a charity. The point is not, is the mortgage real estate, but is it moveable property ? It may become moveable, if *e.g.*, the money is recovered by action from the mortgagor. So, too, if the testatrix had had lands in the Colony, and they had been sold, the proceeds would have become moveable. The contention of the Crown would not be maintainable if the property here were chattels real. See *Freke* v. *Lord Carbery* (4), and *In the Goods of Gentili* (5).

(1) [1895] 2 Q. B. 526.
(2) [1894] App. Cas. 144.
(3) 29 Ch. D. 947.
(4) L. R. 16 Eq. 467.
(5) Ir. R. 9 Eq. 541.

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As a chattel real is an estate or interest in land, so a mortgage creates an estate or interest in land. That the dominant factor in a mortgage is the land is shown by *Sutton* v. *Sutton* (1), where it was held that if the remedy against the land was gone, the personal remedy was gone also. That case is cited with approval in *Lindsell* v. *Phillips* (2). If the contention of the Crown is right that the personal obligation of the mortgagor is what is to be looked at, then a legal mortgage would be placed in an inferior position to an equitable mortgage by deposit of title deeds by reason of the existence of the covenant in the legal mortgage. The cases in which it has been held that legacy duty is payable on property situate abroad are distinguishable; *In re Ewin* (3): the property there was French Rentes, which was personal or moveable. The distinction between personal and moveable is not drawn in the earlier cases. It was only moveable property that was within the scope of the Legacy Duty Acts. It was not till the decision of the House of Lords in *Thompson* v. *Advocate General* (4) that the rule *mobilia sequuntur personam* was conclusively held to apply in the case of legacy duty.

Forbes v. *Steven* (5) is distinguishable: that was a case of partnership, and it was decided that the share of the proceeds of freehold property in India used for the purpose of a partnership, and forming part of the partnership assets, was liable to legacy duty, because under the contract of partnership the freehold property was subject to a trust for conversion, and was to be regarded as personal estate. *Stokes* v. *Ducroz* (6) was also a case of partnership and was decided on the express ground that the interest of the testator in the case was not an interest in land in New Zealand, but an interest in money arising out of the sale of land actually directed to be converted.

Secondly, even if legacy duty would have been payable in England, it is not payable in Ireland by reason of the difference between the Legacy Duty Statutes in England and Ireland. Legacy Duty was introduced in Ireland by 25 Geo. 3 (Ir.) c. 18,

(1) 22 Ch. D. 511.
(2) 31 Ch. D. 291; see *per* Bowen, L.J., at p. 297.
(3) 1 Cr. & J. 151.
(4) 12 Cl. & F. 1.
(5) L. R. 10 Eq. 178.
(6) 38 W. R. 535.

which made the duty payable on the receipt, and was a temporary Act. This duty was continued from year to year, and the rates of duty increased by various statutes (see Hanson on Succession Duty, p. 40), and amongst them by 52 Geo. 3, c. 126, some of the sections of which are important to notice, *e.g.* sect. 113, which provided for an inventory by the executor of the estate and effects of the deceased, distinguishing whether situate in Ireland or elsewhere, sect. 115, which dealt with duties on legacies retained by the executor, and sect. 119, which contained a definition of a legacy, which is in very general terms, and would, if it stood by itself, include moveable property situate abroad. Sect. 136, however, provided that "the several duties charged and to be charged by law in Ireland upon any probate or letters of administration, or receipts for legacies, or shares or proportions of any estate or effects shall be deemed and taken to be charged and payable only in respect of the amount or value of such estate and effects as shall be situate in Ireland and of such legacies as shall be payable out of estates and effects in Ireland." The next statute 54 Geo. 3, c. 92, corresponds to 36 Geo. 3, c. 52, in England, and regulates the management and collection of legacy duty in Ireland at the present time. 55 Geo. 3, c. 78 repealed the existing duties in Ireland and substituted the duties contained in the third part of the schedule of that Act. 55 Geo. 3, c. 81, repealed 52 Geo. 3, c. 126, but by sect. 42 re-enacted the provisions contained in sect. 136 of that Act. 56 Geo. 3, c. 56, repealed 55 Geo. 3, c. 78, and 55 Geo. 3, c. 81, and substituted the duties in the schedule thereto, and by sect. 115 re-enacted the provisions contained in 55 Geo. 3, c. 81, sect. 42. This section has never been expressly repealed: see Revised Statutes, vol. 4, p. 99. 5 & 6 Vict. c. 82 assimilated the rates of duty payable in Ireland with those payable in England under the schedule to 55 Geo. 3, c. 184. If the schedules to 55 Geo. 3, c. 184, and 56 Geo. 3, c. 56, are compared, it appears that the rates of duty were higher in England than in Ireland. The object of 5 & 6 Vict. c. 82 was merely to assimilate the duties, not to take away existing exemptions. It did away with the schedule to 56 Geo. 3, c. 56, and substituted the schedule to 55 Geo. 3, c. 184. If there was any doubt on

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that point, it is removed by sect. 10, which preserved the powers, provisions, and directions in force in Ireland, contained in the Acts relating to the duties thereby repealed so far as they were consistent with the provisions of 5 & 6 Vict. c. 82. Sect. 115 is kept alive by the Inland Revenue Repeal Act, 1870, 33 & 34 Vict. c. 99, which repeals 56 Geo. 3, c. 56, except sects. 115 to 131. It is a legislative declaration that sect. 115 is still in force. This Act of 1870 repealed 5 & 6 Vict. c. 82, except so far as it related to the duties contained in the 3rd part of the schedule to 55 Geo. 3, c. 184. It was at first a temporary Act, and was continued from time to time, and ultimately made perpetual by 16 & 17 Vict. c. 59, sect. 20, which is similar to sect. 10 of 5 & 6 Vict. c. 82. The Legacy Duty Acts are to be construed strictly and in favour of the subject, *Hobson* v. *Neale* (1), and therefore the *onus* is on the Crown to show that sect. 115 is necessarily repealed by implication.

The Attorney-General (*The Right Hon. John Atkinson, Q.C.*), *The Right Hon. C. H. Hemphill, Q.C.* (*The Solicitor-General, W. Kenny, Q.C.; The Right. Hon. The MacDermot, Q.C.*, and *C. E. MacDermot*, with them), for the Commissioners of Inland Revenue:—

First, the application of the rule *mobilia sequuntur personam* brings within the scope of the Legacy Duty Acts a mere debt due from a debtor in a foreign country, whether it is a simple contract debt, or a specialty debt, or a bond given by a person abroad with or without sureties, or a sum of money in a foreign bank; the rule applies to a mortgage, which is a security for the due payment of a specialty debt. The fact that the land of the debtor is mortgaged does not do away with the remedy of the creditor on the covenant of the debtor to pay the debt. If the creditor recovers the amount of the debt by action on the covenant or otherwise he has no longer any right to the land, and if the land proves insufficient to pay the debt he can come

(1) 17 Beav. 178.

down upon the personal estate of the mortgagor after the lapse of many years subsequent to the death of the mortgagor, as was done in *Leahy* v. *DeMoleyns* (1).

Though the land mortgaged may be real estate the mortgage is always regarded in Equity as personal property: Coote on Mortgages (1880 edition), p. 1036; Williams on Executors (8th edition), vol. i. p. 693; vol. ii. p. 669; and *Bligh* v. *Lord Darnley* (2). In *Flack* v. *Longmate* (3) it was decided that a wife was not dowable out of lands held in fee which had been mortgaged to her husband, although the lapse of time and circumstances were such as to render it very improbable that anyone would establish a right to the equity of redemption. This shows that a mortgage was always regarded as personal property till the mortgagee had foreclosed, and converted the estate vested in him as mortgagee into an indefeasible estate. The cases as to partnership cited on the other side support this view.

The only two instances of immoveable personal property are leaseholds, and charges on lands which are part of the realty. In Story's Conflict of Laws, s. 370, it is stated that the debt is the principal thing, and the hypothecation is the accessory. In *The Attorney-General* v. *Lord Sudeley* (4) the question was whether a share of a foreign mortgage was liable to probate duty. It was never suggested there that a foreign mortgage would not have been liable to legacy duty. See the judgment (p. 532) referring to *The Attorney-General* v. *Dimond* (5). The principal thing is the debt, which is not suspended or diminished by the fact of its being secured by a mortgage. *Walsh* v. *The Queen* (6) is no authority for the contention of the petitioners. The question there was whether certain mortgages of land in Queensland made to a bank which carried on business in London and in the Australian colonies were assets in Queensland within the meaning of a local Act imposing a dividend duty. The bank sought to escape making a return as to the mortgages by saying that the money was lent by their branch in Victoria, but the Court held

(1) [1896] 1 Ir. R. 206.
(2) 2 P. Wms. 622.
(3) 8 Beav. 420.
(4) [1895] 2 Q. B. 526.
(5) 1 Cr. & J. 356.
(6) [1894] App. Cas. 144.

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that the mortgages were assets in Queensland. So here the mortgages may have been assets of the deceased in Victoria; but that is beside the point. *Sutton* v. *Sutton* (1) turned entirely on the words of the Statute of Limitations; the creditor there brought an action on the covenant in his mortgage deed, and was met by the defence of the statute that no action should be brought to recover any sum of money secured by any mortgage but within twelve years, and it was decided that an action on the covenant came within the very words of the Act, and that the personal remedy in the case was barred as well as the remedy against the land.

Secondly, if the contention of the petitioners on the second point is correct, then if an Irish testator died possessed of stock or shares of an English Company they would not be liable to legacy duty in Ireland. Sections 115-131 of 56 Geo. 3, c. 56, all deal with probate. At the time that Act was passed the executors got a receipt from the legatee, and on that the duty was paid. Besides, the word "situate" in section 115 is omitted as regards legacies, the words being "in Ireland" only. Is not the Court bound to interpret this section according to the principle *mobilia sequuntur personam,* as the result of holding otherwise would be that money in the Bank of England would not be liable to legacy duty, while money in the Bank of Ireland would?

The words of the schedule to 55 Geo. 3, c. 184, which are made applicable to Ireland by 5 & 6 Vict. c. 82, are most general in their terms. Sections 6, 37, and 38, place Irish legacies on the same footing as English legacies. Section 10 only preserves existing provisions with respect to duties "not hereby expressly provided for," so as to enable the new duties to be recovered in the same way as old duties; but the legacy duty here is "expressly provided for" by this Act. If there is any inconsistency between section 115 of 56 Geo. 3, c. 56, and 5 & 6 Vict. c. 82, the latter must prevail. 8 &.9 Vict. c. 76, s. 4, defines a legacy without any exception as regards Ireland. The Act of 1870 does not affect the question; 56 Geo. 3, c. 56, was only partially repealed because it was desired to preserve the old

(1) 22 Ch. D. 511.

provisions so as to recover the new duties. It also kept alive 5 & 6 Vict. c. 82, so far as it related to the duties imposed by the schedule of 55 Geo. 3, c. 184; but it repealed section 10 of that Act. The later Acts recognise that legacy duty in England and Ireland is regulated by the schedule to 55 Geo. 3, c. 184, *e.g.* 44 Vict. c. 12, ss. 41 & 42. It cannot therefore be contended that section 115 of 56 Geo. 3, c. 56, was kept alive by the Act of 1870.

For a similar instance of a section being retained inadvertently see *Cleland* v. *Ker* (1). Section 115 is inconsistent with the subsequent legislation. Legacy duty is payable here under the combined operation of 5 & 6 Vict. c. 82; 8 & 9 Vict. c. 76; and 16 & 17 Vict. c. 51. The schedule to 55 Geo. 3, c. 184, is the dominant enactment in Ireland as well as in England (2).

Frederick Fleming, in reply :—

As to the second point, the meaning of section 115 is plain, and there is nothing in the omission of the word "situate" in the last clause. A thing could not be in Ireland if it was not situate in Ireland. The question is, what is the meaning of 5 & 6 Vict. c. 82? If that Act was a new departure then the text-writers and the Legislature have all been wrong. See Trevor, page 53, and Hanson, page 41. Section 1 only repeals the duties payable under the 56 Geo. 3, c. 56, which contains a schedule; sect. 2 defines the duties contained in the schedule to the English Act; sect. 6 has no bearing on the point, as there is nothing in the schedule to the Act dealing with legacies. It is a *petitio principii* to say that an Act of Parliament does a particular thing. The Crown must prove that the earlier enactment has been repealed. There has been no express repeal of it; sect. 10 of 5 & 6 Vict. c. 82, prevents any inference being drawn that it was in-

(1) 6 Ir. Eq. R. 288.

(2) It was also argued that the mortgages were liable to succession duty, but counsel for the petitioners objected that it was not open to the Crown to argue this point, as it was not stated in their grounds. The Court intimated that they would give leave to amend on terms, but the question was not fully gone into by counsel for the petitioners, and the Court gave no decision upon it.—[REP.]

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tended to get rid of the exemption in sect. 115. Is not the fair meaning of the Act that it only increased the rate of duty and made the executor liable for the duty and that all the old provisions as to raising and getting in the duty, remained in force?

[PALLES, C. B.: You are overlooking what I wanted to know. The duties are imposed on the subject-matters mentioned in the English schedule. The Act therefore not only alters the rate of duty but the taxable matter.]

That cannot be, because there is the same schedule in the Irish Act as in the English Act.

[PALLES, C.B.: Are they identical?] (1).

54 Geo. 3, c. 92, is still in force; sect. 4 of that Act directs the executor to deliver an inventory of effects, distinguishing whether situate in Ireland or elsewhere. That is pointed to the exemption given by 52 Geo. 3, which is re-enacted in 56 Geo. 3, c. 56, s. 115. There was no such requirement in England. It was decided in *Raymond* v. *Watteville* (2) that the Prerogative Court could not require an inventory of a personal estate situated in Germany. The exemption in favour of charities in section 38 of 5 & 6 Vict. c. 82, was inserted because a similar exception occurred in the schedule to 56 Geo. 3, c. 56, which was superseded, and not in the body of the Act. No argument can be drawn from the circumstance that the exemption mentioned in sect. 115 is not specified in 5 & 6 Vict. because it was contained in a substantive section and not in the schedule to 56 Geo. 3, c. 56. A repeal if not express must flow from necessary implication: Hardcastle on Statutes, p. 346; *Thames Conservators* v. *Hall* (3); *Garnett* v. *Bradley* (4); *Young & Co.* v. *Mayor of Leamington* (5). There is no necessary implication here.

It is an error to say that 5 & 6 Vict. is repealed. 55 Geo. 3, c. 184, had the same relation to 36 Geo. 3, c. 52 in England, as

(1) A discussion here followed as to this, and Mr. Furlong, solicitor for the Commissioners, at the request of the Lord Chief Baron, examined the schedule to the two Acts, and stated that the items in them were not identical; but this was not admitted by counsel for the petitioner, who proceeded with his argument.

(2) 2 Phill. (Lee), p. 551.
(3) L. R. 3 C. P. 415.
(4) 3 App. Cas. 951, 953.
(5) 8 App. Cas. 526.

5 & 6 Vict. c. 82, had to 5 & 6 Geo. 3, c. 56 in Ireland; but the duties imposed by 36 Geo. 3, c. 52, were specified in the body of the statute, and not in the schedule The Act of 1870 recognises sect. 115 as existing; the Act of 1881 makes no difference; it only refers to 55 Geo. 3, c. 184; but that Act is only applied to Ireland by 5 & 6 Vict. c. 82. In *Blackwood* v. *The Queen* (1) it was decided that the personal representative of a testator domiciled in Victoria was only bound to account for personal property actually situate in Victoria. It was argued there that all the personal property of the testator wherever situate should be included in the account. It may be said that the duty imposed by the Victorian Act was a probate duty, but it was really a composite duty, and the case was decided on the ground that though the words of the Colonial Statute were "personal estate" without saying where situate, the intention of the statute was only to tax the assets situate in Victoria.

The same inference may be drawn from the Irish Act, which does contain words of restriction. Ireland, like Victoria, was regarded as an inferior country, which could not impose a tax on any property outside it. The Trustee Acts afford an analogy; under the Trustee Act, 1893, which re-enacted the provisions of the earlier statute, the Chancery Division in Ireland could not make a vesting order as to lands in England, though the Chancery Division in England could make a vesting order as to Irish lands, and an express statute had to be passed for the purpose, viz. the Trustee Act, 1893, Amendment Act, 1894, to enable the Irish Court to make vesting orders as to English land. *Re Ewin* (2), which is the first case in which it was decided that foreign personalty was liable to legacy duty, was not decided until 1830, fourteen years after 56 Geo. 3, c. 56, s. 115 was passed, and the liability of assets situate abroad to legacy duty in England was not finally settled till 1845 by the House of Lords in *Thomson* v. *Advocate-General* (3), which was decided upon statutes applying to England and Scotland only.

As regards the first point, the principle of *Forbes* v. *Steven* (4) does not apply. The mortgagee has an interest in the land:

(1) 8 App. Cas. 82.
(2) 1 Cr. & J. 151.
(3) 12 Cl. & F. 1.
(4) L. R. 10 Eq. 178.

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Toppin v. *Lomas* (1). The observations of Lord Watson in *Walsh* v. *The Queen* (2) are a general statement of the law as to what a mortgage is. Not only has the mortgagee an interest in the land, but in the present case, as appears from the petition, in one instance possession has been taken on behalf of the mortgagee. There is no duty on the executors of the testatrix to realize the assets secured by the mortgages; they will go to the residuary legatees, and they can take them *in specie*. It has been said that a residuary legatee can only take what he gets from the executor, but this applies equally to any other legacy, *e.g.* a legacy charged on land; and yet it is admitted that a legacy charged on land abroad would not be subject to legacy duty. The principal mortgages here were assets of the deceased in Victoria; they are only transferable in that country under the Transfer of Land Statute, 1866, under which no interest passes until the transfer of the mortgage is registered on the local register. Although that statute only gives the mortgagee a charge on the land, the mortgagee has the same remedies as if the real estate in the lands had been transferred to him: see sections 42, 59, and 105 of that statute, the effect of which statute is that the mortgages must be regarded as immoveable property by the law of the Colony.

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PALLES, C.B.:—

Two questions have been argued in this case: 1, whether section 115 of 56 Geo. 3, c. 56, is still in force; and 2, if not, whether, at the time of the passing of the Finance Act, 1894, legacy duty was payable in respect of such mortgages as are mentioned in the petition.

It is admitted that section 115 of the Act 56 Geo. 3, was in force up to the passing of the 5 & 6 Vict. c. 82; and the sole question which I propose to consider, upon this first branch of the case, is whether the latter Act worked an implied repeal of the 115th section of the former statute.

The object of the 5 & 6 Vict. c. 82, as appears from its pre-

(1) 16 C. B. 145. (2) [1894] App. Cas. 144.

amble, was to assimilate the stamp duties in Great Britain and Ireland, and for that purpose to repeal certain of the stamp duties then payable in Ireland, and to grant others in lieu thereof. Prior to that Act there were two different sets of duties, one payable in Ireland, the other in England. The Irish duties were enumerated in the schedule to 56 Geo. 3, c. 56, which related to Ireland only. The English duties were enumerated in a different statute, viz. 55 Geo. 3, c. 184. The section under consideration, *i.e.* section 115, is contained in the first mentioned of these Acts, viz. that relating to Ireland solely; and up to the passing of the 5 & 6 Vict. c. 82, that section had relation only to the duties specified in the schedule to that Act.

The Act of 1842, in the first place, repealed all the duties specified in the schedule to the 56 Geo. 3, c. 56, and then by section 2, enacted "there shall be *granted*, raised, levied, collected and paid in Ireland, . . . for the use of Her Majesty . . . in lieu of the duties . . . hereby repealed . . . the several duties . . . following, that is to say, for and in respect of the several instruments, articles, matters and things mentioned, enumerated and described, *mutatis mutandis*, in the schedule to the 55 Geo. 3, c. 184 (except those standing under the head of exemptions), or for or in respect of all instruments, &c., of the like nature, kind and description respectively in Ireland . . . such and the like duties as by or under the said last mentioned Act, or by or under any subsequent Act, are now payable in England, for or in respect of the said instruments, articles, matters and things respectively mentioned, enumerated and described in the said schedule to the Act 55 Geo. 3, c. 184."

Thus, not only are the rates of duties in Ireland assimilated to those in England, but the subject-matters subjected to duty in Ireland are the same subject-matters as, had they been in England, would have been liable to duty. The same one schedule declares the same one set of duties for both countries, in respect of subject-matters within the respeetive countries, which are described by the same words. These words effectively carry out the intention mentioned in the preamble, to assimilate the stamp duties in Great Britain and Ireland. A perfect assimilation requires not only identity in the rate of duties, but in the dutiable subject-matters.

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Pausing here for a moment, I have to observe that this statute does not expressly repeal section 115 of the Act of 1815, nor, indeed, any more of it than so much as actually grants the duties. I account for this by the fact that nearly the entire—perhaps I might say the entire—of that statute, with the single exception of section 115, relates to the raising, levying, collecting and paying of the duties, and not to the subject-matters thereby rendered dutiable; and it is plain, from section 10, which was so much relied upon by the appellants, that the scheme of the Act was to preserve all the former provisions as to collection and procedure, and to apply them to the newly granted duties. Accordingly by section 10, all powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties in force in Ireland at the time of the passing of the Act, relating to the repealed duties, or to any prior duties of the same kind, are directed to be of full force and effect with respect to the new duties.

In truth the whole question is, to what extent are those previous powers and provisions applied? This extent is declared in the following words: "As far as the same are or shall be applicable *in all cases not hereby expressly provided* for, and shall be observed, applied, enforced and put in execution, *so far as the same shall not be superseded by*, and shall be consistent with, the express provisions of this Act, for the *raising*, *levying*, *collecting*, *paying*, *accounting for and securing* of the said duties hereby granted, and for the preventing, detecting and punishing of all frauds, forgeries and other offences relating thereto, as fully and effectually as if the same had been herein repeated."

Now, as the incorporation, in this Act, of section 115 of that of 1815, would have the effect of limiting the subject-matters expressly made liable by section 2, there appear to me to be in section 10 three distinct and different expressions which exclude it from the general words with which the section commences—1, they are to have effect only so far as they shall be applicable in cases "not hereby expressly provided for"; 2, they are to be applied "so far as the same shall not be superseded by, and shall be consistent with the express provisions of this Act"; and 3, they are to be applied for the raising, levying, collecting, &c., of the new duties.

Now, the only effect of sect. 115 is to limit the extent of the taxable subject-matters; and the extent of the subject-matters made liable to the new duties is by the Act "expressly provided for."

Secondly, the application of the limitation would not be "consistent with the express provisions of this Act."

Thirdly, to apply it to the new duties would be an application of it, not to the "raising, levying, and collecting" of the duties, to which alone they are declared applicable, but to the granting of them.

The only other section of the Act of 1842 to which I think it necessary to refer is the proviso at the end of sect. 38: "Provided that nothing herein contained shall extend or be construed to extend to charge with duty in Ireland any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable." This shows that where the Legislature intended to exempt from taxation, in favour of Ireland, subject-matters therein which were taxable in England, they did so by express words; and in my opinion the language of sect. 2, and of the preamble, rendered it pre-eminently necessary to do so.

For these reasons I am clearly of opinion that sect. 10 applies only to the then existing provisions as to matters of procedure, and does not affect the taxable subject-matters; and that consequently sect. 115 of 56 Geo. 3 (Ir.) is not now in force.

The only other argument on this part of the case to which it is necessary to refer is that derived from sect. 115 having been mentioned in the schedule to the Act of 1870. That Act, which is called "The Inland Revenue Repeal Act, 1870" (33 & 34 Vict. c. 99), recites that it is expedient that the enactments described in the schedule thereto should be repealed, to the extent and in the manner thereinafter appearing; and then, by sect. 2, it enacts that the enactments described in the schedule are thereby repealed, subject to the exceptions in the schedule mentioned. Turning to the schedule I find the 56 Geo. 3, c. 56 is mentioned, and opposite to it, in the column headed "Extent of Repeal," are the words "the whole Act, except sects. 115 to 131, both

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inclusive." In my opinion the effect of specifying the extent of the repeal in this mode is identical with that which it would have been if each of the particular sections intended to be repealed had been enumerated in the column, instead of being described as they have been. There is, no doubt, a clear intention not to repeal sect. 115, but I cannot find the slightest intention to re-enact it, to render it applicable to duties to which the Legislature had not previously applied it, or, indeed, to deal with it at all.

I now come to the second question, which to my mind is one which does not admit of any doubt, and must, upon settled principles of law, be ruled in favour of the Crown.

The Finance Act, 1894, s. 2 (2), enacts that "property passing on the death . . . when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

The property in question here is so situate as not to be subject to probate duty; and in that sense is, and for the purposes of this case I treat it as being, "situate out of the United Kingdom," although, in a sense, it has no *situs* of its own. But if, before the Act, legacy duty was payable in respect of it, estate duty is now payable. Thus the question is, would legacy duty have been payable before the Act upon these mortgages of foreign property? I was surprised to hear it stated that, to the present, there had not been any decision upon this question. This seems extraordinary, considering the large number of mortgages of foreign railways which are held by persons domiciled in London. If the debts secured by the mortgages were not charged upon real estate, admittedly they would have been liable to legacy duty. The basis of the decision of the House of Lords in *Thomson* v. *Advocate-General* (1) is contained in the following sentence of the opinion of the Judges, as delivered by Tindal, C.J.:—"We cannot consider that any distinction can be properly made between debts due to a testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and a different country; but

(1) 12 Cl. & F. 18.

that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicil of the testator or intestate."

Upon the other hand, it is clear that if a person domiciled in this country had, at the time of his death, an estate in land in a foreign country, which estate was not subject to redemption, and was not held as security for a debt, that estate would constitute immoveable property in the foreign country, and as such would not be subject to legacy duty. Thus the net question is, what is the effect of these debts being charged upon land in a foreign country? Do they, by reason of the mere circumstance of being so charged, lose the character they otherwise would have borne of moveable property, and by reason thereof become immoveable property, as if the estate therein of the deceased was absolute, and not by way of mortgage?

Now although, for many purposes (perhaps for all purposes), whether property so situate is to be deemed immoveable or moveable must be determined by the *lex loci rei sitæ*, that foreign law must be treated by us as a question of fact. The liability to duty depends upon and must be determined by the law of this country, although in applying that law we must have regard to the foreign law, if it be relied upon as a relevant fact. But in the present case it is not contended that according to the law of the foreign country these mortgages constitute immoveable property. Had that been relied upon, the foreign law should have been ascertained as a matter of fact. The first ground of appeal is that the said mortgages are immoveable property situate out of the United Kingdom; that is, that according to the law of this country, without having recourse to the extrinsic fact of the law of the foreign country, the mortgages are immoveable property. The other grounds of appeal, with the exception of the fifth and sixth, which have not been argued, are mere variations of the first ground. In result, then, the only matter of law for our determination is whether, according to our law, a debt secured by a mortgage of land in a foreign country is moveable or immoveable property; and we determine this the moment we determine whether the property is in character a debt with an accessory right to resort to the land for payment, or is in character an

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estate in land, measured by the amount of the debt. Now this cannot depend upon the locality of the land upon which the debt is charged. The character must be the same, whether the land is situate in a foreign country or here. This brings the matter to a point which is absolutely settled, and was determined centuries ago, when it was held that the beneficial interest in a mortgage in fee passed, upon the death of an intestate, to his administrator, and not to his heir.

There must be judgment for the Crown; but as the Attorney-General has stated that this is the first case in which the question has been argued, we shall not give costs against the appellants.

ANDREWS and MURPHY, JJ., concurred.

Solicitors for the petitioners: *A. & J. Robinson.*

Solicitor for the Commissioners of Inland Revenue: *The Solicitor for the Inland Revenue.*

J. P. B.

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April 17, 20.

THE EARL OF WESTMEATH *v.* JOHN COYNE, EXECUTOR DE SON TORT OR OTHERWISE OF PATRICK COYNE (1).

Civil-bill decree renewal—Executor de son tort *of deceased defendant—"Personal representative"—14 & 15 Vict. c. 57, ss. 9, 142—Certiorari—Discretion—27 & 28 Vict. c. 99, s. 9.*

In section 142 of 14 & 15 Vict. c. 57, the words "personal representatives" (of a deceased party to civil bill proceedings) do not include any but a rightful executor or administrator; and therefore there is no jurisdiction in a Civil Bill Court to renew against an executor *de son tort* a decree obtained against the person with whose assets he has intermeddled.

Where a plaintiff in a Civil Bill Court obtained a renewal against an executor *de son tort* of a decree for more than £20, made against the deceased defendant, the Court, in the exercise of the discretion given by 27 & 28 Vict. c. 99, s. 9, refused to order a writ of *certiorari* to issue under that section to remove such renewal decree, so as to give it the effect of a judgment of the High Court.

MOTION, *ex parte*, on behalf of the plaintiff, for a writ of *certiorari*, under 27 & 28 Vict. c. 99, sect. 9, to remove into the

(1) Before JOHNSON, HOLMES, and GIBSON, JJ.

Queen's Bench Division a renewal of a civil bill decree obtained against John Coyne, as executor *de son tort* of Patrick Coyne, the defendant in the original civil bill decree. In January, 1894, the plaintiff had obtained a civil bill decree against Patrick Coyne, for £64 15*s.* rent and costs. The decree was lodged with the sheriff for execution, who returned *nulla bona*. In June, 1895, the plaintiff got a renewal of this decree in the County Court, and the sheriff, to whom it was delivered for execution, again made a return of *nulla bona*. In October, 1895 (the defendant Patrick Coyne, having meanwhile died), the plaintiff obtained a further renewal, on notice, "against John Coyne, as executor *de son tort* or otherwise of Patrick Coyne." This was likewise lodged with the sheriff who made the same return as in the former cases. It was stated in the affidavits, filed on the plaintiff's behalf in support of the present application, that on Patrick Coyne's death, John Coyne, his son, had entered upon and had continued in possession of his father's farm (for the rent of which the original civil bill had been brought), and was still in possession thereof as executor *de son tort* or otherwise of his father Patrick Coyne; and that the said John Coyne had no goods or chattels, which could conveniently or at all be taken in execution under the renewal decree so obtained (1).

C. F. Doyle, for the plaintiff, referred to section 57 of 14 & 15 Vict. c. 57 (by which "any person rendering himself an executor *de son tort* shall be liable to be sued by civil bill, as if he were a rightful executor, in the manner and to the extent herein mentioned respecting rightful executors, provided that such executor *de son tort* shall not be liable beyond the amount of the assets actually received by him"); and to section 142 of the same Act (which provides that any decree or dismiss may be renewed "against any defendant or plaintiff or surviving defendant or plaintiff, or the personal representatives of such parties respectively"); and relied on *Hughes* v. *Dillon* (2), a decision of O'Brien, J., on a civil bill appeal, that a renewal could be obtained against an executor *de son tort*, and *Maguire* v. *Hanly* (3), a

(1) Counsel had applied in the first instance at Chambers to Gibson, J., by whom the application was referred to the Divisional Court.

(2) 19 Ir. L. T. R. 50.

(3) 28 Ir. L. T. R. 116.

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decision of Andrews, J., to the same effect. [Counsel referred to an unreported decision of Palles, C. B., to the contrary (1), and also cited *Doherty* v. *Nelson* (2) and Williams on Executors, Ed. 1879, p. 209.]

Cur. adv. vult.

April 20.

JOHNSON, J.:—

This is a motion *ex parte* on behalf of the plaintiff for an order under the 27 & 28 Vict. c. 99, sect. 9, for a writ of *certiorari* to remove into this Court a judgment of a Civil Bill Court, in order to give it the force and effect of a judgment of a superior Court. It appears by the affidavits on which the motion is grounded that, in January, 1894, the plaintiff, the Earl of Westmeath, obtained a civil bill decree against Patrick Coyne (his tenant from year to year of a farm of land) for £64 15*s.*, arrears of rent and costs. The decree was delivered for execution to the sheriff, who returned *nulla bona*. In June, 1895, the decree was renewed between the same parties and delivered for execution to the sheriff, who again returned *nulla bona*. Then a change took place; Patrick Coyne, the defendant, died possessed of this farm, into possession of which his son, John Coyne, entered and has since continued; and in October, 1895, after the death of Patrick Coyne, the plaintiff, the Earl of Westmeath, obtained a further renewal of the decree against John Coyne, "as executor *de son tort* or otherwise of Patrick Coyne." This was also delivered for execution to the sheriff who again returned *nulla bona;* and it appears on affidavit that the only means of realising the amount of the decree is by giving it the effect of a judgment of this Court, under the 27 & 28 Vict. c. 99, and levying it against this farm.

Mr. Doyle, according to the proper practice, applied in the first instance in Chamber to my brother Gibson, who referred him to this Court, which has jurisdiction to grant the motion if satisfied that the amount of the decree exceeds £20, exclusive of costs, and that there are no goods or chattels which can be taken under the decree, and if it "shall think fit," that is, if, in the proper

(1) See *Garvey* v. *Johnston*, 28 Ir. L. T. R. 154. (2) [1892] 2 Ir. R. 90.

exercise of a judicial discretion, it shall think fit. By the Common Law, a person who, without lawful authority, enters into immediate possession of and holds a farm of which a deceased person was tenant from year to year, may become executor *de son tort* of that tenancy, because a creditor of the deceased is not bound to look further than the fact that such person is in possession of assets of the deceased and acting as, and the creditor believes him to be, executor of the deceased; and such person, by his acts in the character of executor, estops himself from denying that he is executor. But, although the renewal of October, 1895, is not before this Court by way of appeal or by *certiorari*, yet it is referred to and made an exhibit of in the affidavit, and is before the Court; and, in order to determine whether the present is a "fit" case in which to exercise the jurisdiction given by the 27 & 28 Vict. c. 99, sect. 9, the question for the decision of the Court is not whether John Coyne is executor *de son tort* of this farm, but whether he is "representative" or "personal representative" of Patrick Coyne, within the provisions of the Civil Bill Act, 14 & 15 Vict. c. 57, sect. 142, because the jurisdiction of the Civil Bill Court to renew a decree is derived entirely from the statute.

The Civil Bill Act (14 & 15 Vict. c. 57), by section 57, enacts that any person rendering himself an executor *de son tort* shall be liable to be sued by civil bill as if he were a rightful executor, in the manner, and to the extent therein mentioned respecting rightful "executors," but not "beyond the amount of the assets actually received by him." This section creates a personal and individual civil bill liability on the part of any person wrongfully interfering with the assets of a deceased person to the extent, but only to the extent, of the amount of the assets actually received by such wrongdoer; it does not affect, directly or indirectly, the rest of the assets with which he has not intermeddled. Section 139 enacts that every decree and dismiss shall be in force for one year, and (if not previously executed) may be renewed from time to time every six months. Section 140 enacts that no decree shall be renewed until the plaintiff, or one of the plaintiffs, or, in case of the death of a sole plaintiff, his or her "personal representatives or one of them," or, if more plaintiffs than one, the surviving

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plaintiff or "one of the representatives of a deceased plaintiff," shall have made affidavit in the prescribed form, stating, among other things, the sum decreed and then remaining due to the plaintiff or plaintiffs or "their personal representatives," provided that a deponent who was party to the original cause as "personal representative" to some other person or who seeks to renew "any decree or dismiss as executor or administrator" of one of the parties in the original cause, may depose on belief. The person who seeks to renew under this section must prove title affirmatively, and must therefore show that he is representative of the deceased lawfully constituted, and not a person who by intermeddling with assets has wrongfully and without authority brought on himself, to the extent of his intermeddling, the liability of an executor. Section 142 enacts that it shall be lawful for any plaintiff or defendant, or surviving plaintiff or defendant, "or the executor or administrator" of any plaintiff or defendant by whom any decree or dismiss was obtained, to renew any decree, dismiss, affirmance, or renewal, "against any defendant or plaintiff, or surviving plaintiff or defendant, or the personal representatives of such parties respectively"; but, after two years, not without the prescribed notice to the person against whom the renewal is sought.

The words "representative" and "personal representative" appear to me to be used in the same significance in each of the two sections 140 and 142; their primary and ordinary acceptation is a lawfully constituted executor or administrator of the deceased, and I find nothing, nor have we been referred to anything in this or any other statute, to show that they are used in any other sense in any part of those sections. Any other construction would lead to embarrassment and difficulty, and I therefore think that this is not a fit case in which to order a writ of *certiorari* to issue to remove the renewal of October, 1895. But, having regard to the reported cases which were mentioned in the argument, for my own part, as this order is the subject of appeal, I hope the question will authoritatively and finally be decided by the Court of Appeal.

HOLMES, J. :—

I concur, and, if I do not add anything to the judgment delivered by Mr. Justice Johnson, it is not because I have not given the question before us my careful consideration. I have had to consider it on several previous occasions, and, on the present motion, I have listened attentively to the arguments that Mr. Doyle has addressed to the Court. In adopting the judgment of Mr. Justice Johnson, the only observation which I should like to add is that the section of the statute 14 & 15 Vict. c. 57, s. 57, under which an executor *de son tort* is "liable to be sued" as if he were a rightful executor, to the extent of assets actually received by him, cannot apply to proceedings of this kind, for this is not a suit, it is a renewal of a judgment given in a suit.

GIBSON, J. :—

In the Superior Courts of Common Law and Equity it is conceded that a judgment or decree could only be revived against a rightful representative. The expressions "personal representative," in section 153 of the Common Law Procedure Act, 1853, and "legal representative" in section 157, cannot extend to an executor *de son tort*. So, in the Civil Bill Act of 1851, in sections 140 and 141, which give the right of renewal to "personal representatives," that phrase cannot be extended to wrongful executors. I do not see why section 142, giving a right of renewal against "personal representatives," should be differently construed. If a decree can be renewed against an executor *de son tort*, does such renewal affect the right to obtain a renewal against an executor or administrator afterwards rightfully constituted? And how would such renewal against a wrongful executor operate on the Statute of Limitations in such a case as *Irish Land Commission* v. *Junkin* (1)?

Though "executor" at Common Law, and possibly in some legislation, may include a wrongful executor, I do not know that "legal" or "personal representative" bears that meaning, at least in statutes. In the Statute of Distributions it signifies next-of-kin. Usually the term is used in a testamentary sense; and,

(1) 24 L. R. Ir. 40.

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without a coercive context, it must import a lawful relation at least. Whether in the Act of 1851, on its context, the phrase may or may not embrace a husband in his old common law capacity, I do not think it necessary to determine. I agree with what is represented to have been the Lord Chief Baron's decision, that a civil bill decree cannot be renewed against an executor *de son tort*. If such executor is not a personal representative for the purpose of revivor in the Superior Court, he cannot be such representative for the purpose of renewal in the County Court.

Solicitor for the applicant: *P. S. Golding.*

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March 4. April 25.

IRISH LAND COMMISSION *v.* ROWNTREE.

Tithe rentcharge—"Perpetual estate or interest"—Lessee for lives renewable for ever continuing in possession after death of cestui que vies—1 & 2 *Vict. c.* 109, *ss.* 7, 8.

A lessee under a lease for lives renewable for ever, continuing in possession after the lives named in the lease have been allowed to drop without renewal, but still possessing the right to renew, is an owner of a "perpetual estate or interest" within 1 & 2 Vict. c. 109, ss. 7, 8, and he, not his lessor, is liable to tithe rentcharge under that section.

Henderson v. *Dean of Londonderry* (2 Cr. & Dix. 494) followed.

CIVIL BILL APPEAL from a dismiss pronounced by Mr. D. Mahony, sitting for his Honor, the County Court Judge of Meath. The civil bill was for £2 11*s* 8*d*., arrears of tithe rentcharge, due out of part of the lands of Losset in that county. The defendant, who was owner in fee of these lands, had demised them for a term of thirty-one years or three lives, the lease containing a covenant for perpetual renewal in the ordinary form. The last life of the lease dropped in 1878 (the concurrent term of years having expired previously), and no renewal had been taken out. The Irish Land Commission, in whom the tithe rentcharge was vested, had unsuccessfully sued the lessee in the Civil Bill

Court for the amount now claimed, the latter setting up the defence that he was a "present tenant" at the rent mentioned in the original demise. The Irish Land Commission, having thereupon brought the present civil-bill proceedings against the owner in fee, and their claim having been dismissed at Quarter Sessions, now appealed to the Judge of Assize, Mr. Justice Gibson, who heard the case and reserved judgment.

D. G. Chaytor appeared for the appellants.

J. H. Campbell, Q.C., for the respondent.

The following authorities were referred to:—*Orpen* v. *Moore* (1); *Anon.* (2); *Re Langley, Minors* (3); *Chandos* v. *Brownlow* (4); Lyne on Leases, p. 64; 1 & 2 Vict. c. 109 (5).

GIBSON, J.:—

April 25.

The question in this case is whether a tenant in possession under a lease for lives renewable for ever, is, after the lives have dropped, owner of a perpetual interest under section 8 of the Act 1 & 2 Vict. c. 109, and therefore liable to tithe rentcharge. The defendant is sued as owner in fee on the assumption that as his tenant is only yearly tenant at law and is not bound to renew the latter does not represent a perpetual interest. It is conceded that the right of renewal is in full force, but that there is no obligation binding the tenant to take out a renewal. So long as the

(1) 2 Jones, 435; 5 Law Rec., N. S., 249.
(2) 4 Law Rec., N. S., 179.
(3) 5 Law Rec., N. S., 1.
(4) 2 Ridg. at p. 405.

(5) Section 7 of 1 & 2 Vict. c. 109, enacts that where lands are charged with tithe rentcharge, the same shall (subject to certain exceptions here immaterial) "be payable by the party having in such lands respectively the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest as hereinafter defined, under which, or derived wherefrom there shall be no such perpetual estate or interest."

Section 8 enacts that "any estate or interest held under any deed or instrument containing any provision, contract, or covenant for the perpetual renewal thereof . . . shall be deemed and be taken to be, for all purposes relating to the said rentcharges, equivalent to a perpetual estate or interest."

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right of renewal subsists, the tenant is entitled (if he likes) to a perpetual interest. The lease still binds the fee; and having regard to the custom of the country as to renewal, recognized as it is by statute law, I think that the tenant whose possession has arisen out of the lease comes within section 8, so long as he is entitled to perpetual renewal. The point of the section is the right to perpetuity. Whether the lives are in being or not, the tenant need not renew; but if he is entitled to a perpetual interest, the section applies. It would be inconvenient if his liability was intermittent, ceasing when the lives dropped, reviving when a new lease was executed. The opinion of Baron Pennefather in *Henderson* v. *Dean of Londonderry* (1) is a direct authority for holding the tenant liable. I therefore affirm the dismiss below. I have disposed of the case on admissions, without hearing evidence, on the assumption adopted by counsel that the occupying tenant represents the entire interest in the original lease with absolute right of renewal, and that the lease, if the lives were in being, was a perpetual estate within section 8.

Solicitors for appellants: *Montgomery & Chaytor.*
Solicitor for respondents: *Sullivan.*

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(1) 2 Cr. & Dix. 494.

CAMPION *v.* PALMER (1).

(1895. No. 9977.)

Q. B. Div. 1896. Jan. 13, 20, 24, 29. *Appeal.* Feb. 12, 14.

Practice—Garnishee order—Judgment—Mortgage of equity of redemption—Notice by mortgagee to tenants—Judicature Act, 1877, *sect.* 28, *sub-sect.* 5.

A, who was the owner of lands, mortgaged them by deed, first to B, and secondly to C, whose mortgage deed recited B's security, but, subject to B's rights, empowered C to enter into receipt of the rents and profits. B not having interfered, C served notice on the tenants to pay him :—

Held, that a judgment against A, obtained after this notice, could not be enforced by a garnishee order against rents due by the tenants.

MOTION to make absolute a garnishee order, notwithstanding cause shown.

The defendant Palmer was seised in fee of certain lands in the Queen's County, subject to five mortgages, the third in point of date, May 7th, 1877, being vested in Thos. Leech. The deed to Leech recited the previous incumbrances and disclosed that the legal estate was outstanding in the first mortgagee. Subject to the rights of the prior incumbrancers, Leech was empowered by his mortgage upon default of payment to enter into the receipt of the rents of the mortgaged premises. None of the incumbrancers however, interfered with the mortgagor's possession until the 26th November, 1895, when Leech served notice on the tenants of the lands requiring them to pay their rents to him and cautioning them against paying any other person claiming under the defendant. The plaintiff in the present action had issued a writ of summons on the 18th November, 1895, to recover £300 on promissory notes made by the defendant, and, on the 3rd December, 1895, obtained judgment for the amount due, £300, and £5 16*s.* costs. On the 7th December, 1895, the plaintiff obtained an order that the sum of £300 6*s.* 8*d.*, rents in the hands of the defendant's tenants, and due by them respectively

(1) In the Queen's Bench Division before SIR PETER O'BRIEN, L.C.J., and O'BRIEN and GIBSON, JJ.

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to the defendant, as set out in a schedule annexed to the order, should stand attached to the extent of, and to answer in payment of, the plaintiff's judgment debt, and that such tenants should attend and show cause why they should not pay to the plaintiff so much of the said sum due by them respectively as would satisfy the plaintiff's judgment debt.

Drummond Q.C. (*Law Smith* with him), for the plaintiff.

Meredith, Q.C., and *Oulton*, for Leech, and the tenants against whom the order was made, showed cause.

Cur. adv. vult.

Jan. 29.

SIR PETER O'BRIEN, L.C.J. :—

The case involves a point of some general importance. Before adverting to the principles which govern our decision, I should wish to say one word about the facts. It appears that the security upon which the action was brought was a promissory note, passed by the defendant to the plaintiff, and that, when this note was two days old, the plaintiff sued upon it, and obtained judgment by default. Mr. Oulton suggested that these proceedings were a sort of contrivance to enable the plaintiff, by obtaining judgment and an order for a receiver founded thereon, to defeat the claims of Mr. Leech, a puisne mortgagee of the defendant's lands. It is not requisite for us, in the view we have taken, to pronounce an opinion on the *bona fides* of the plaintiff and the defendant in the action, but I cannot part from the facts without saying that they are eminently suggestive. But now what are the legal principles applicable to the case? The judgment creditor seeks to attach the rents payable by the tenants on the mortgaged lands. The defendant had mortgaged these lands to three or even more persons; and Mr. Leech, one of the puisne mortgagees, who is here represented by Mr. Oulton, comes in to show cause against the order which the plaintiff has obtained attaching the rents, and to have it discharged. Notice has been served by Mr. Leech upon the tenants to pay the rents to him, and Mr. Oulton contends that the judgment creditor cannot have any higher right than the mortgagor—the defendant, in the present case—had; and that the mortgagor's rights were subject to the mortgages which he had created, including the mortgage to Mr.

Leech. Such shortly are the facts and the contention that has been addressed to the Court.

Nothing can be better settled than that a judgment creditor has no higher right than the judgment debtor himself possesses; and the best exposition of this familiar doctrine is to be found in the case to which my brother Gibson has referred me, *Cole* v. *Eley* (1). In that case Mr. Justice Collins says: (His Lordship then read from the judgment of Collins, J., at page 187 of the report, and continued). Then Mr. Justice Collins refers to the case which Mr. Meredith has cited during this argument, *Badeley* v. *The Consolidated Bank* (2), and proceeds to give a clear exposition of the doctrine that the judgment creditor stands in the shoes of the defendant, his debtor, and can claim no greater or better right than he has. Let me now turn to the mortgage deed in the present case. It is a deed recognising the existence of prior mortgages, and it provides that, if default is made in the payment of the principal sum or interest, it shall be lawful for the mortgagee, Leech, his executors, administrators and assigns, to enter upon all or any of the mortgaged premises and to hold and enjoy them and to receive the rents and profits thereof subject to the claims of the prior mortgagees. What were the rights of the mortgagor as between him and the puisne mortgagee? He had by this deed parted with the right to receive the rents. There seems to be no doubt, upon this covenant, that, in any contest between the mortgagor and a second mortgagee, it must be held that, subject to the rights of the first mortgagee, the mortgagor has parted with all his rights. Therefore, in my opinion, the judgment creditor cannot claim to receive the rents as against the puisne mortgagee, to whom the mortgagor has already transferred his rights. The first mortgagee is in this case quiescent; of course, when he appears, his claim is paramount; but, apart from this, the covenant in the deed controls the rights of the mortgagor and puisne mortgagee as between themselves.

We have, during the argument, been referred to the 28th section of the Judicature Act, 1877. In my judgment, that section means simply this, that if the mortgagor is allowed

(1) [1894] 2 Q. B. 180, 350. (2) 38 Ch. D. 238.

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to remain on in possession, his rights shall not be defeated merely by showing that the legal estate is outstanding. It is quite another matter, and subject to other considerations, if a puisne mortgagee interposes and claims, as Leech has here claimed, to exercise the rights that the mortgagor has transferred to him. His claim is based on the express language of the mortgage made to him, and, inasmuch as the judgment creditor stands in the shoes of the mortgagor, he can have no higher right than the mortgagor could have. The order must therefore be discharged with costs.

O'BRIEN, J.:—

Upon the first discussion of the matter the principal difficulty that appeared to be in the way of a successful resistance to the rights of the mortgagee Leech, by the judgment-creditor applying for attachment of the rents by means of a receiver, was the existence of the notice which Leech had caused to be served on the tenants, so preventing the rents from being paid over to the mortgagor. The difficulty still remained, what was to become of the rent—the tenants could not keep it always, the mortgagor could not sue for it, and the puisne mortgagee was not in a position to sue for it, not being an assignee of the reversion. This was the difficulty that pressed on my mind; but on further consideration I think that there is an answer to the argument: for the same difficulty would apparently arise in the case of the first mortgagee, who likewise could not require the tenants to pay the rent to him forthwith but must sue the tenant directly or take proceedings for the appointment of a receiver, just as the puisne mortgagee must do, in order to compel the tenants to pay the rent to him. But the disability of the mortgagor to continue in receipt of the rent arises in both cases, not from any proceedings to recover or attach the rents, but from the service of the notice. The Lord Chief Justice has referred to the covenant in the mortgage deed. It is the ordinary covenant appearing in every mortgage deed; but its effect cannot at all, for that reason, be withdrawn from it. The covenant is in effect that on default of payment of principal or interest, the mortgagee may, after the six months, enter into possession and receipt of the rents and

profits. The covenant is precisely the same in the case of a first and of a second mortgagee. It gives no immediate right of entry at all, or right to receive the rents. The mortgagee, first or second, must proceed either by ejectment to recover the lands or by the appointment of a receiver to attach the rents. Both mortgagees are in precisely the same position. The form of the conveyance is in both cases the same—an absolute conveyance. The form of the covenant is the same, and the remedy on that covenant must be pursued in exactly the same manner. This removes, I think, the difficulty that the rent would remain otherwise undisposed of.

It is quite clear that section 28 of the Judicature Act did not give any estate to the mortgagor. It was its intention to replace him in the same position as, before the passing of the Act, he had occupied in fact, though at law he was only the bailiff of the mortgagee or tenant by sufferance. Even if this deed did not contain the covenant in question, I would hold it was the intention of the statute to allow any mortgagee to serve a notice so as to intercept the receipt of the rents by the mortgagor. The circumstances referred to in the present case show that there was some idea existing in the minds of the plaintiff and the defendant, who gave him the promissory note on which judgment in the present action was obtained, that by this judgment and receiver order the plaintiff would be in a better position than the mortgagee. But this appears to be founded on a mistaken view of the law; for ever since the case of *M'Dowell* v. *Wheatley* (1), the principle has been always recognised that a creditor under a judgment can only claim the same right which the debtor himself possessed. The case involves some complex considerations; but, in favour of honesty and right, I must hold, nothwithstanding the statute, that the judgment creditor obtains no better position than that occupied by his debtor.

GIBSON, J.:—

It is not disputed that, if the mortgagee's notice to the tenants arrested the mortgagor's right to receive the rents, the garnishee

(1) 7 Ir. C. L. R. 562.

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order must be discharged, as such order can only affect what equitably belonged to the judgment-debtor. Whether the notice had the effect of intercepting the rents depends partly on the construction of the Judicature Act, and partly on the operation of the mortgage deed. It is a third mortgage, and only affects the equity of redemption.

At the time the Act was passed the rights of the parties were as follows:—The first mortgagee having the legal estate was usually entitled to recover possession without any previous demand, and, where the estate was sublet, he could by notice enforce payment of rents to himself as owner of the reversion. A puisne mortgagee out of possession had no such rights. His remedy under his security, where the mortgagor was in possession, was to apply for a receiver, who, when appointed, received the rents for his benefit notwithstanding the existence of a prior mortgagee, who was postponed until the receiver was extended to his demand. The mortgagor in possession was as to the part of the estate unlet a kind of tenant at sufferance or will; as to the part in the hands of tenants, it was held that he was not a tenant at will of the reversion: *Moss* v. *Gallimore* (1); but though, not being tenant of the reversion, he could not sue for such rents, he could distrain as bailiff for the legal mortgagee, and receive the rents so obtained for his own benefit: *Trent* v. *Hunt* (2).

The object of the Judicature Act was, without prejudicing the right of the mortgagee, to confer upon the mortgagor, as beneficial owner, while lawfully in possession, enforceable rights as against tenants and for the protection of the estate. These rights are only given to a mortgagor who is entitled to the possession. The question here is, Does a mortgagor, allowed to remain in possession by the legal mortgagee, become disentitled by the demand or notice of a puisne mortgagee? The answer depends on whether such mortgagee could maintain an ejectment against such mortgagor, and enforce payment of rent if the estate is sublet. If he could not, as against him the mortgagor is entitled to possession.

The argument in favour of such ejectment being maintainable

(1) 1 Smith's L. Cas. (ed. 1896), p. 496, judgment of Ashurst, J.
(2) 9 Exch. 14.

is to the following effect:—The mortgagor who is equitable owner is legally a kind of tenant at will of the part of the estate not in the hands of tenants; and such tenancy at will is assignable. If the puisne mortgage did not disclose the prior mortgage, the mortgagor would be estopped from questioning the mortgagee's title in ejectment. Though the prior mortgage is disclosed, the puisne mortgagee, as grantee of the mortgagor's entire estate and interest has a better title to possession than the mortgagor. Except the decision of May, C.J. (1), no authority was mentioned supporting the right of a puisne mortgagee to recover possession.

On the other side there is the decision of the Lord Chief Baron in a case from which an appeal could have been taken, expressly denying any such right (2). *Feehan* v. *Mandeville* (3) is an authority which bears on the question of estoppel and legal estate; and *Allen* v. *Woods* (4), though decided on a special state of facts, decides that, generally at least, the legal estate must be before the Court in ejectment. In that case Lord Esher held that where a purchaser in possession without conveyance conveyed to a second purchaser, such second purchaser could not sustain an ejectment against one who took possession, without making the legal owner party. The first purchaser was apparently tenant at will. The strongest argument against ejectment is that in no case, either at law or in equity, before the Judicature Act, is there any example of a puisne mortgagee being held entitled to possession, the only remedy of such mortgagee being the appointment of a receiver by the Court. It is now well settled that where no remedy existed in equity or at law, the Judicature Act does not create a new remedy. In the last edition of Fisher on Mortgages (p. 845) it is stated that a puisne mortgagee cannot by notice obtain payment of rents—at least under the usual form of mortgage deed.

Assuming, however, that a mortgagor may be entitled to possession against a puisne mortgagee, notwithstanding notice by the latter, there may be something in the mortgage deed that may transfer to the mortgagee the mortgagor's statutory rights, if they

(1) *Brown* v. *Hallissy*, 12 Ir. L. T. R. 159.

(2) *Hodgens* v. *O'Donoghue*, 28 Ir. L. T. R. 98.

(3) 28 L. R. Ir. 90.

(4) 68 L. T. (N. S.) 143.

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Gibson, J.

are not personal to the mortgagor; and it is said that the deed here has that effect, especially having regard to the covenant for quiet enjoyment. Under this covenant it is suggested that the mortgagee can restrain the mortgagor from receiving the rents, or can sue for them in the mortgagor's name as trustee. The covenant is however in the usual form adopted where the mortgage is of an equity of redemption, as appears from Hayes, Prideaux, Davidson, and other works on Conveyancing. If the conveyance itself gives no right to the rents, it is not easy to see how the covenant for title and quiet enjoyment can have that effect; and no case can be found where equity has enforced the security against possession directly, save by a receiver. If the conveyance does not transfer the legal right to enforce payment of rent, how can the covenant have that effect? It would be inconvenient if the mortgagee could by notice arrest the payment of rent without being able himself to receive it.

The obvious policy of the section was to invest the equitable owner with certain rights usually enjoyed in practice so long as the mortgagee chose to allow him to remain in possession. The section does not disclose any intention to improve the position of a puisne mortgagee, who must derive his right to possession from other clauses of the statute.

I do not think that, since the Judicature Act, the fact that the dry legal estate is outstanding in a bare trustee or termor must necessarily defeat an ejectment; nor do I see why, if a mortgagor in possession sold his equity of redemption, the purchaser should not be at liberty to recover possession against the vendor, the legal mortgagee not interfering. Is a puisne mortgagee in the same position? The question is one of great difficulty, and my hesitation is increased by the decision of the Lord Chief Baron, which I would have preferred to follow, leaving the question to be finally determined elsewhere.

The more I have thought upon the case, the more doubt I feel, though I am not prepared to dissent from the conclusion adopted by the other members of the Court.

A. E. R. J.

The plaintiff appealed (1).

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Drummond, Q.C., and *Law Smith*, for the appellant:—

An equitable mortgagee cannot go in and take the rents from the tenants by serving notice on them to pay; his remedy is to apply for a receiver. A puisne mortgagee cannot maintain an ejectment: *Hodgens* v. *O'Donoghue* (2). *Patterson* v. *O'Reilly* (3) is an authority directly in point, and decides that tenants' rents can be made the subject of a garnishee order, notwithstanding the existence of a mortgage.

Sect. 28, sub.-sect. 5, of the Judicature Act gives a right to the mortgagor which he had not before, and it affects the puisne mortgagee by the rights it gives to the first mortgagee against the mortgagor. If the assignee of a legal mortgage of lands sub-mortgages his security, and brings an action of ejectment without the concurrence of the sub-mortgagee, the action cannot be maintained: *Feehan* v. *Mandeville* (4). If the first mortgagee serves notice on the tenants, then the puisne mortgagee cannot come in at all; but if the first mortgagee does not go into possession the right of the puisne mortgagee is to get a receiver appointed: *Abbot* v. *Stratten* (5). But when a receiver, appointed on the petition of a puisne incumbrancer is afterwards extended, the rents received before the extension of the receiver belong to the puisne incumbrancer: Fisher on Mortgages, p. 844. A garnishee order binds only so much as the debtor can deal with himself: *General Horticultural Co.* (6); *Badeley* v. *Consolidated Bank* (7).

Meredith, Q.C., and *Oulton*, for Thomas Leech:—

It is contrary to equity that the puisne mortgagee who is prior in point of time should be ousted of his rights. A creditor can only attach by a garnishee order the property of the debtor, which the debtor was entitled to deal with himself: *Badeley* v.

(1) In the Court of Appeal, before FITZGIBBON, BARRY, and WALKER, L.JJ.

(2) 28 Ir. L. T. R. 98.

(3) 10 L. R. Ir. 304.

(4) 28 L. R. Ir. 90.

(5) 3 Jo. & Lat. 603.

(6) 32 Ch. D. 512.

(7) 38 Ch. D. 238.

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Consolidated Bank (1); *Cole* v. *Eley* (2). The existence of a second mortgage would be sufficient to disentitle the plaintiff to get a garnishee order: *Collins* v. *Thompson* (3).

FITZGIBBON, L.J.:—

This case was at hearing in the Court below on January 13, 20, and 24, and on January 29 the Lord Chief Justice and O'Brien, J. allowed the cause shown against the garnishee order, while Gibson, J. gave reasons for making it absolute, though he concluded his judgment by saying that he was "not prepared to dissent from the conclusion adopted by the other members of the Court."

Having considered the matter carefully, we do not feel any difficulty in affirming the order of the Court below.

The facts are simple:—The defendant was the owner of land which he had mortgaged, and on May 7, 1877, he executed a further mortgage to Leech, the respondent in the appeal. That mortgage recites prior incumbrances, and shows the legal estate to be outstanding in the first mortgagee; but, subject to the rights of the prior incumbrancers, it expressly provides for the receipt of the rents by the puisne mortgagee, Leech.

By the abstention of all the mortgagees from putting their mortgages in force, the mortgagor remained in receipt of the rents until November, 1895. On November 26, 1895, Leech served notice of his mortgage on several of the tenants whose rents are sought to be attached, and required them to pay their rents to him, cautioning them, at the same time, against paying them any longer to the mortgagor, or any one on his behalf.

In the meantime, on November 16, ten days before this notice was served, the defendant signed two promissory notes, one for £200, and the other for £100, payable on demand to the plaintiff. The plaintiff sued at once on these notes, and on December 3 he obtained judgment by default.

On December 7 he obtained the order which we have now to consider. This was, as usual, an absolute order to attach the tenants' rents, and a conditional order to pay them to the judgment creditor.

(1) 38 Ch. D. 238. (2) [1894] 2 Q. B. 180. (3) 13 Ir. C. L. R. App. 51.

The Lord Chief Justice truly said that these dates were "suggestive," but we have nothing to do with that. The plaintiff's judgment is regular, and whether he acted in concert with the defendant or not, or had the object of securing a preferential payment to himself, as against the mortgagee who served the notice, we must give him his rights as a judgment creditor entitled to execution, but nothing more.

Before the Judicature Act, when the mortgagee of a legal estate permitted a mortgagor to remain in possession, or to receive rents, the mortgagor was, in a sense, the bailiff of the mortgagee, and unless and until the mortgagee served notice on the tenants, they could not set up the existence of the mortgage as an answer to the mortgagor's demand for rent, though they could do so in answer to an ejectment. The principle of this was that if the mortgagee did not give notice of his rights, and allowed the tenants to pay their money to the mortgagor, thereby allowing them to act on the assumption that the mortgagee's rights were not to be enforced, he could not afterwards compel the tenants to pay twice. The mortgagor's receipt was a good receipt for any rents paid before notice given, but from the moment that the mortgagee gave notice to the tenants that their landlord had parted with the legal estate, and required them to act on that knowledge, they could no longer pay any rent to him, whether actually due, or only accruing when the notice was received.

The question then arises—how far does the position of the first mortgagee, who has the legal estate, differ from that of the puisne mortgagee who has an equitable estate only? The difference, in my opinion, consists in this—that the mortgagee who has the legal estate has more direct and better remedies than an equitable owner or puisne mortgagee; but, as between mortgagor and mortgagee, the effect of the mortgage is the same. Every time the mortgagor executes a mortgage, after the first one which conveys away the legal estate, he assigns away a further slice off the equity of redemption, by what is, as against him, just as much an assignment of his property, as if he was transferring the legal estate. Whenever the assignee gives notice to the tenants of such an assignment, the effect in determining the power of the assignor any longer to give a good receipt for rent is the same, whether

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the mortgage be legal or equitable. It gives to the tenants, who were theretofore the debtors of the mortgagor, notice that their creditor has parted with his right to receive their money. The puisne mortgagee cannot sue them directly, nor exercise against them any powers incident to the legal estate, but he can stop the mortgagor from receiving their money by his implied permission. Furthermore, as it seems to me, he can put himself into the place of the mortgagor, and though he cannot recover the rents directly, *in invitum*, yet, if the tenants pay their rents to him without notice of the prior mortgage, the legal mortgagee will be just in the same position as if the mortgagor had received those rents. It is said that the puisne mortgagee could only enforce payment by suit for the appointment of a receiver. Granting this, all rents received by a Court receiver would be paid to a puisne creditor who procured his appointment, until some prior incumbrancer extended the receiver to his demand. If the puisne mortgagee entered into receipt of the rents, or appointed a receiver under his deed, must not the application of the rents be the same?

But the plaintiff's claim may be tested in another way. He got judgment on December 3, 1895. If he registered that judgment as a mortgage, his priority would be only of that date, and his rights would be subject to the mortgage of May 23, 1877. The garnishee order cannot give the plaintiff any other or better right than the defendant had at its date. The plaintiff could not have seized under a *fieri facias* money which was not then the defendant's, and the mortgagee by serving his notice on the tenants had previously put it out of the power of the defendant to give a good receipt for any rent then due and unpaid, or thereafter accruing.

The case would stand thus, irrespective of the Judicature Act, and I cannot agree with the argument addressed to us that the legal rights of the parties have been affected by that Act. Sect. 28, sub-sect. 5, which was relied on, in my opinion, only defines the rights and powers of "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been

given by the mortgagee," and enables such a mortgagor to do certain acts incident to the legal estate. Before the Act, mortgages were often used by tenants for the purpose of defeating mortgagors, whom mortgagees had no desire or intention to disturb in the possession or management of the mortgaged land, or in the receipt of the rents and profits. The second clause of sub-sect. 5 shows the intention of the Act, namely, that under such circumstances, the action of the mortgage "shall not be defeated by proof that the legal estate in the lands" is in a mortgagee, but the Act has no bearing on the rights or position of equitable owners, or of mortgagees *inter se*. The principle contended for by the appellant, if it were well founded, would extend to every case where the mortgagor's estate was an equitable one, and would enable a judgment creditor by a garnishee order to defeat even the first mortgagee of such an estate, though the Judicature Act, sect. 28, sub.-sect. 5, could not apply to such a case. The rights of the puisne mortgagee against the mortgagor arise from the assignment to him of the mortgagor's estate, whether legal or equitable, and it being clear that the judgment creditor can have no better right than the defendant had at the date of the judgment, as the mortgagor could not then require the rents to be paid to him, as against a mortgagee who had previously given notice of his mortgage, the order appealed from must be affirmed, and the appeal dismissed with costs.

BARRY, L.J., concurred.

WALKER, L.J.:—

The question in this case is whether, notwithstanding the conveyance by deed of the equity of redemption by the mortgagor, and the intervention of the equitable mortgagee by notice on the tenants, the rents still belong to the mortgagor so that this form of execution can be made available against them by the judgment creditor. In other words, are the equitable rights of the equitable mortgagee sufficient to defeat the garnishee order?

A legal mortgagee is assignee of the reversion, and the tenants on the mortgaged estate become his tenants, and by giving notice to the tenants of his mortgage he assumes the position of landlord

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to every intent. The equitable mortgagee cannot by notice only obtain the actual receipt of the rents. His remedy to get possession of the rents and work out his equitable title is to obtain a receiver, but in the case of both legal and equitable mortgagees some steps are necessary to perfect and enforce their rights. One has a right in law, the other has a right in equity. The mode of assertion of the rights is, or may be, different. A conveyance by deed of the equity of redemption conveys in equity all the subsisting rights of the mortgagor, and conveys an equitable right to get the receipt of the rents as against the mortgagor.

In *Collins* v. *Thompson* (1) the contest was between Flint, who was in the position of an equitable mortgagee, and the judgment creditor. Flint had registered a judgment as a mortgage against the equity of redemption, and it was held that Flint's right to the rents was sufficient to defeat him.

An order for a receiver had been there made, but it had not been served on the tenants when the garnishee order was obtained. The only difference is that Flint had there gone further on the road towards actual receipt under his equitable title. I do not think the rights of the equitable mortgagee are to be measured merely by the right to recover possession at law or his inability to evict. Equitable claims must be considered on motions of this kind.

The 28th section of the Judicature Act does not, I think, affect, and was not intended to affect, the rights of an equitable mortgagee. The object of that section was only to enable the owner of the equity of redemption, left in possession, to do in his own name what he would before have been obliged to do in the name of the mortgagee, if such mortgagee had the legal estate. It is a statutory delegation of the legal estate for named purposes, and where the mortgagor chooses to convey away his equity of redemption, I do not think it strengthens in any way the position of the mortgagor against his equitable assignee. In fact it seems to me wholly irrelevant to such a conflict as exists here. In *Patterson* v. *O'Reilly* (2), Mr. Justice O'Brien took a view of that section which is not consistent with his decision in the present case, and I prefer to follow his later view.

(1) 13 Ir. C. L. App. 57. (2) 10 L. R. Ir. 304.

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The contract gives a right of entry for the rents to the equitable mortgagee under the existing circumstances, and he has actually intervened to pursue his rights, and I concur with the Queen's Bench Division, that he has an equitable right to the rents sufficient to prevent the mortgagor and the creditor, who only represents the mortgagor's rights, from receiving them adversely.

Solicitor for plaintiff: *W. J. Menton.*
Solicitor for Thomas Leech: *John T. Roe.*

R. D. M.

O'BRIEN *v.* O'BRIEN.

Ex. Div. 1895.

Nov. 25, 28. 1896. Feb. 3.

Appeal. April 20, 21. May 1.

(1894. No. 5593.)

Will—Construction—Surviving children—"Surviving" read "other"—Settled shares—Stirpital construction.

A testator devised to his son M. the lands of A., charged with an annuity of £200 for his son H., and bequeathed to his son T. the lands of S., held for a term of years, charged with an annuity of £100 for his son H.; and he declared that the several bequests to his sons M. and T. should be for their life-use only, and after the decease of each of his said sons the estate or property bequeathed to him should, subject as aforesaid, go to such one or more children of such son respectively, exclusive of the other or others of the children of such son, for such estates as such son should by deed or will appoint, and with such provisions as he should think proper to charge for a wife or children. And for default of such limitations, then to the use of all his children, share and share alike, as tenants in common, and to their respective heirs, executors, administrators, and assigns. And upon the death of either of his sons M. and T., without leaving any child or children, or grandchild or grandchildren, him surviving, the property bequeathed to such son so dying, should, subject as aforesaid and to any jointure created by such son for a wife, go over to the survivor of them the said T. and M.; such survivor in such case taking also a life estate only in said lands, with power of appointment to his children, and with remainder to his children in default of appointment, and with such power of jointuring and charging for his wife and children as thereinbefore given to them in respect of the properties thereinbefore specifically given to them, and to go over in default of appointment as in case of their own original shares;

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and in case of the death of both of them the said M. and T. without leaving any child or children, grandchild or grandchildren, him surviving, the testator directed that the estates bequeathed to M. and T. respectively should, subject as aforesaid, go over to his son H. for such life estate, with such power of appointment to his children, and with such remainder to his children in default of appointment, and with such power of jointuring for a wife and of charging money thereon for his children as was thereinbefore given to M. and T.; and in case all his sons should die without leaving child or children, grandchild or grandchildren, them surviving, the properties bequeathed to his sons respectively should go to his daughters Mary and Emma, their heirs, executors, administrators, and assigns.

The testator left him surviving his three sons, M., T., and H. M. died on the 15th March, 1878, leaving a daughter Mary, who died in 1881, when three years old. H. died on the 23rd November, 1878, leaving two sons Timothy and Henry Donat. T. died in 1892, unmarried, and after his death Timothy and Henry Donat took possession of the lands of S.

C., the widow of M., obtained letters of administration to her daughter Mary, and brought an ejectment against Timothy and Henry Donat to recover the lands of S.:—

Held, by the Exchequer Division and by the Court of Appeal, that the word "survivor" in the gift over upon the death of T., without leaving child or grandchild, must be read "other," and that the plaintiff was, therefore, entitled to recover.

Motion in lieu of demurrer.

The action was brought to recover possession of the lands of Shrahane, in the barony of Clanwilliam and Co. of Limerick, containing 134 acres and 37 perches, Irish Plantation Measure, and of the bog and commonage attached thereto, and for mesne profits: the plaintiff sued as administratrix of Mary O'Brien, deceased. The material facts and documents in the case as disclosed by the statement of claim were as follows:—

Timothy O'Brien was seized of the lands of Ayle, Longford Castle, Sparrowfield, Grenane, and Gortbrien; he was also entitled under a lease dated the 29th December, 1853, to the lands of Shrahane, in the county of Limerick, for a term of 999 years, at the rent of £136 16*s.* 6*d.*

By his will dated the 7th October, 1869, Timothy O'Brien disposed of these lands as follows:—

"I leave and bequeath to my son Michael O'Brien, for such estate as hereinafter mentioned, the lands of Ayle, Longford Castle, Sparrowfield, Grenane, and Gortbrien, chargeable with

the annual sum of £200 a-year, to be payable to my son Henry Pierce O'Brien, his heirs and assigns for ever. I bequeath to my son Theobald Donat O'Brien, for such estate as hereinafter mentioned, the lands of Shrahane, Dunvellin, and Mentello, chargeable with the annual sum of £100, to be payable to my said son Henry Pierce O'Brien, his heirs and assigns for ever; said two annuities to be payable half-yearly, and the first half-yearly gales thereof respectively to be payable in six months after my decease, and such annuities to be recoverable by distress as in such cases usual. And my will is that the several bequests hereinbefore given to my said sons, Michael and Theobald Donat, shall be for their life-use only, and after the decease of each of my said sons the estate or property bequeathed to him shall, subject as aforesaid, go to such one or more children of such son respectively, exclusive of the other or others of the children of such son, as such son shall by deed or will, duly executed and attested, direct and appoint, for such estates, and subject to such provisions and limitations as he shall think fit, and subject to such jointure and charges as he may think proper to charge for a wife or children. And for default of such limitations then to the use of all his children share and share alike, as tenants in common and not as joint tenants, and to their respective heirs, executors, administrators, and assigns. And that upon the death of either of my said sons Michael or Theobald Donat without leaving any child or children, grandchild or grandchildren, him surviving, the estate and property hereby bequeathed to such son so dying shall, subject as aforesaid and to any jointure created by such son for a wife, go over to the survivor of them the said Theobald Donat O'Brien and Michael O'Brien; such survivor in such case taking also a life estate only in said lands with power of appointment to his children, and with remainder to his children in default of appointment, and with such power of jointuring and charging for his wife and children as is hereinbefore given to them in respect to the properties hereinbefore specifically bequeathed to them, and to go over in default of appointment, as in case of their own original shares; and in case of the death of both of them, the said Michael O'Brien and Theobald Donat O'Brien, without leaving any child or children, grandchild or grandchildren him surviving, I will and direct that the estates

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hereby bequeathed to the said Michael and Theobald Donat respectively shall, subject as aforesaid, go over to my son Henry Pierce O'Brien for such life estate, with such power of appointment to his children, and with such remainder to his children in default of appointment, and with such power of jointuring for a wife, and of charging thereon money for his children as is hereinbefore given to said Michael O'Brien and Theobald Donat O'Brien; and in case all my said sons shall die without leaving child or children, grandchild or grandchildren, them surviving, my will is that the estates and properties hereinbefore bequeathed to my said sons respectively shall go to and vest in my daughters Mary Jane O'Brien and Emma Margaret Hobson, their heirs, executors, administrators and assigns, for ever, as tenants in common and not as joint tenants."

The testator bequeathed to his daughter Mary Jane O'Brien £6000, to his son Michael O'Brien £4000, to Theobald £4000, to Henry £1500, and to his daughter Emma £3000, and appointed Michael his residuary legatee and devisee, and Michael O'Brien, William Doyle Hobson, and Edward White, executors. The testator died in 1870.

The testator left his three sons, Michael, Theobald Donat, and Henry, him surviving. Michael died on the 15th March, 1878, leaving a daughter, Mary, who died on the 11th Sept., 1881, when three years old; Henry died on the 23rd November, 1878, leaving two sons, Timothy John and Henry Donat; and Theobald died on the 5th October, 1892, unmarried. He had been in possession of Shrahane from the death of his father. Letters of administration to Mary O'Brien, daughter of Michael O'Brien, were taken out by her mother Charlotte Mary O'Brien, the plaintiff in the action. The defendants were Timothy John O'Brien and Donat O'Brien, who had gone into possession after Theobald's death.

The Solicitor-General, Kenny, Q.C. (with him, *Bushe, Q.C.*, and *Redmond Barry*) for the plaintiff:—

As between Michael O'Brien and Theobald Donat O'Brien, "survivor" must be read "other." The whole scheme of the will indicates that the testator's intention was that on the death of either of the brothers without issue surviving his lands should pass

to the other brother, and with the lands given to the latter form a conjoint estate which was to be held as a whole until the event happened on which it was to pass over to Henry Pierce O'Brien. The terms of the gift over to Henry Pierce O'Brien and the event on which alone it was to take effect makes it necessary to construe survivor as "other." The so-called "stirpital doctrine" does not apply.

Ronan, Q.C. (with him *Matthew J. Bourke, Q.C.*, and *Cullinan*), for the defendants:—

The "stirpital doctrine" has been established by modern decisions. The word "survivor" need not necessarily be read in its ordinary literal sense, or in the sense of "other." In a case such as the present "surviving" must be read in the sense of surviving either by himself or by representation through his children capable of taking under the original gift.

[The following cases were cited during the argument: *Waite* v. *Littlewood* (1); *Badger* v. *Gregory* (2); *Smith* v. *Osborne* (3); *In re Bowman* (4); *Doe* v. *Waineright* (5); *Cooper* v. *M'Donald* (6); *Wake* v. *Varah* (7); *Lucena* v. *Lucena* (8); *In re Benn* (9); *Wilmot* v. *Wilmot* (10); *Browne* v. *Rainsford* (11); *In re Dunlevy's Trusts* (12)].

Cur. adv. vult.

1896. Feb. 3.

PALLES, C.B.:—

I entirely assent to the contention that "survivor" is not to be read in the sense of "other," unless an intention appears on the face of the will which cannot be effectuated unless it is so read. I respectfully adopt the language of Lord Selborne in *Waite* v. *Littlewood* (1): "There is certainly a very strong probability that any one using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into 'other,' and say

(1) L. R. 8 Ch. App. 70.
(2) L. R. 8 Eq. 78.
(3) 6 H. L. Cas. 375.
(4) 41 Ch. D. 525.
(5) 5 T. R. 427.
(6) L. R. 16 Eq. 258.
(7) 2 Ch. D. 348.
(8) 7 Ch. D. 255.
(9) 29 Ch. D. 839.
(10) 8 Vesey, 12.
(11) I. R. 1 Eq. 384.
(12) 9 L. R. Ir. 349.

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it is used merely by mistake for the word 'other,' which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs; though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning."

Upon the other hand, words are no more than symbols of thought. In construing a will we have to ascertain the meaning indicated by all the words used, taken together; and if the intention thus gathered from the document, as a whole, shows that a particular expression is used in an inaccurate sense, or is an imperfect expression which does not completely express the whole intention, in such a case, the inaccuracy or want of completeness of the expression being clearly ascertained from the other words, we are as much bound to read that expression, although inaccurate or incomplete, in its accurate and exhaustive sense, as if the testator had in so many words directed us to do so. Further, the more frequently a particular word is used which does not completely express the only sense intended, and the more apparent it is why the incomplete expression was used, the easier it is for the Court to depart from its ordinary meaning so as to effectuate the general intention.

Now, there are few words so often used in an incomplete, and even in an inaccurate sense, as "survivor," and its cognate word "surviving"; and in the present case there is, to use Lord Selborne's words, "a reason of some kind for its use." Here, as in *Waite* v. *Littlewood* (1) the surviving son is to take for life, so that the first limitation over cannot take effect unless the other son be

(1) L. R. 8 Ch. App. 70.

living at the death. In truth, the expression "survivor" is a compound one. One element in it is "other"; but this word, alone, does not fully express the idea of the testator here, because *that other* is contemplated by the testator as one who is to take a life estate—in other words, as a living person. Thus, he devises a life estate to "the survivor," meaning "the other if then living." The difficulty in the case is that the grammatical collocation of the word, by the use of the pronoun "his," imports into the devise to the children in remainder the contingency involved in that part of the compound expression "survivor" which in its equivalent "other, if then living," is expressed by the words "if then living." The devise is "to *his* children." Whose children? Contrast the different answers to be given to this question, according as the word used is "survivor," or its equivalent, "other, if then living." In the first case, the answer is the children of the survivor: the contingent part of the expression is carried into the description of the objects of the gift in remainder. In the latter case the answer is the children of the other, the contingency being confined to the gift for life to the survivor. Now, the question is, which of these two constructions is to be adopted? that is, in strictness, not whether survivor is to be read simply "other," but "other, if then living." To solve this question we must have recourse to the entire will to ascertain whether the intention was that the estate of the children should depend upon the chance of their father surviving his brother.

In the will we have a concurrence of three separate matters which, taken together, are in my opinion, inconsistent with the estate of the children being so dependent—1, there is a limitation over, if Michael and Theobald Donat die without children, or grandchildren living at the dates of their respective deaths; 2, the gift over now under construction follows a gift, not to a class, but to two designated individuals, and is to take effect upon the death of either under prescribed circumstances; 3, the limitation to the children in the gift over is, "as in the case of their own original shares."

The importance of the first of these circumstances is that, although in relation to these lands the testator has indicated an intention to prefer his son, Henry Pierce, to his daughters and to

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his residuary legatees, yet he has shown that they shall not take, unless the double contingency shall happen, of both his sons, Michael and Theobald Donat, dying without children or grandchildren, living at their respective deaths. As a Court will not, unless coerced, impute to a testator an intention to die intestate, such a disposal of his property *primâ facie* involves an intention that, in every state of circumstances consistent with the gift over not taking effect, the objects of his bounty previously named shall, between them, take his entire estate in the lands. These circumstances include the event of one of the two devisees dying childless, the other devisee having predeceased him and left children; and the intention thus indicated cannot be effectuated if "survivor" be read strictly.

Again, the devisees being two only, and the gift over being to take effect, upon the death of *either* under the prescribed circumstances, the intention is clear that the lands are to go over in either of two events, viz. on the death of that one of them who shall die first, and also on the death of that one of them who shall die second, provided only he die under the prescribed circumstances; and this intention as to the property which is devised over on the death of him who shall happen to die second cannot take effect unless "survivor" shall be so read as to be capable of being applied to the predeceasing son.

Thirdly, as the children are to take under the limitation over "as in the case of their own original shares," and as the class who under the former are to take in default of appointment include all the children living at the death of *their* father, the gift over ought to be read so as to include the same class, whilst the construction suggested by Mr. Ronan must necessarily have for its basis an intention not to benefit a child who, although he had survived his father, predeceased his uncle.

Having from these circumstances gathered a clear intention that the contingency of the devisee over surviving his brother was not intended to affect the gift in remainder to his children, that intention, in my opinion, coerces us to read "survivor" so as to give effect to this intention. The mode in which, until Lord Selborne's accession to the woolsack, this intention was uniformly carried out, was by reading the word "survivor" as "other,"

so that, if we act upon the authorities prior to that time we should be coerced to read "survivor" in the present case as, meaning its equivalent, "the other, if then living," such "other" taking a life estate, with remainder to the children of such other in equal shares in default of appointment.

It has, however, been argued that, although this is the construction that would have been put upon this will, had this case come on for decision at any time prior to 1873, yet that since that time a new rule of construction has been laid down in England, by which we are forced to hold that "survivor" here means surviving either in person or by his children and that as the child of Michael died before Theobald Donat, the gift over did not take effect. The result of this construction, in the events which have happened, would be an intestacy as to the interest now subsisting in these lands.

Now, as rules of construction are matters upon which the titles of many estates depend it would take much argument to persuade me that any Judge or Lord Chancellor is competent of his own mere motion, and without the authority of Parliament, to change a well settled rule.

It is right, however, to consider whether in fact the rule of construction applicable to the present will has been changed, and that induces me to do that to which I ordinarily have the utmost repugnance, when construing a will, viz. to consider the beadroll of cases to which we have been referred. On the one hand, there are the lines of cases in which any one of the three circumstances to which I in the outset referred, have been deemed conclusive. On the other there are those which are said to lay down or adopt the so-called stirpital construction.

As to the effect of the three circumstances I have alluded to, I shall refer to but one case in illustration of each. As to the first, the gift over being limited to take effect on the death of *both* the brothers without leaving children or grandchildren, James, L.J., then Vice-Chancellor, in *Badger* v. *Gregory* (1), uses the following words: "The number of cases before the Courts in which they have felt themselves bound, or at liberty, to construe 'survivor' as 'other,' shows that there is some vernacular not in uncommon

(1) L. R. 8 Eq. 78.

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use with testators, in which the word is used in that artificial sense, or that there is a great liability in testators to fall into the same mistake in using the one word instead of the other." He then proceeds to give an instance of "survivor" meaning "other," which is not inapplicable to the present case: "When, for instance, Blackacre is given to A, for life, with remainder to his children, and Whiteacre to B for life with remainder to his children, and in case either should die without children, then his acre to go to the survivor and his children, the presumption is almost conclusive that the word 'survivor' is put in contradistinction to 'the one so dying,' and means the one that does not die childless. If, in addition to this, the will goes on and says, 'and if both shall die without children then the whole shall go to C,' the conclusion that 'survivor' means 'other' becomes irresistible."

The second circumstance I have alluded to, viz., the first devise being to two nominated individuals, was the *ratio decidendi* of Lord Cranworth in *Smith* v. *Osborne* (1).

The third circumstance was considered so important by Kay, L.J., then Mr. Justice Kay, in *In re Bowman* (2) a case decided long after the alleged adoption of the so-called "stirpital construction," that he held that it alone, without a general gift over was sufficient to entitle children of a deceased tenant for life to participate.

Upon the other hand, in support of the contention that, in a case such as the present, "surviving" must be read in the sense of surviving either by himself or by representation by his children capable of taking under the original gift, the cases principally relied upon by Mr. Ronan were *Doe* v. *Waineright* (3); *Waite* v. *Littlewood* (4); *Cooper* v. *M'Donald* (5); *Wake* v. *Varah* (6); *Lucena* v. *Lucena* (7); and *In re Benn* (8). Upon careful examination of these cases it will be found that none of them bear upon the present one.

In *Doe* v. *Waineright* (3) the limitations of the deed were, after the death of Mary Abell, to the use of her child or children

(1) 6 H. L. Cas. 375.
(2) 41 Ch. D. 525.
(3) 5 T. R. 427.
(4) L. R 8 Ch. App. 70.
(5) L. R. 16 Eq. 258.
(6) 2 Ch. D. 348.
(7) 7 Ch. D. 255.
(8) 29 Ch. D. 839.

in tail, as tenants in common if more than one, with remainder, as to the share of any child or children who should die without issue, to the use of the surviving child or children of Mary Abell in tail, and so *toties quoties* until there should be only one child left, with remainder in case all should die without issue to Robert Abell, in fee. There, the intention was clear, as it is in the present case, that the estate to be taken by the heirs of the body of a child who died leaving issue, in the share of another child who died without issue, was not to depend upon the event of their parent living at the time of the determination of the estate tail of the child who had died without issue; and effect was given to that intention.

The words in the judgment of Lord Kenyon, C.J., principally relied upon, were:—"The fair construction of that word standing in this context, is that on the death of one child without issue, that child's portion shall go to the surviving line of heirs, and not merely to one child surviving. *It must go to the surviving children, in their own persons if living, or if dead to their issue.*" Lord Kenyon's *ratio decidendi*, in arriving at this conclusion, was the gift over in case all the children should die without issue. "We cannot," he says, "give effect to the word 'all,' without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children, exist." Ashurst, J., adds—"The portion of the child dying without issue was to go over, not merely to the surviving children, but to the surviving children and the surviving heirs of the children who were dead. This manifestly appears to have been the intention of the parties from the last sentence, for the ultimate limitation is only to take effect on the death of *all* the children without issue."

The decision there was that the deed created cross remainders in tail between the children of Mary Abell, an effect which would be produced by reading the word "surviving" as "other," which is the word ordinarily used by conveyancers in raising cross remainders in such a case. I do not understand by Lord Kenyon's words, "must go to the surviving children, in their own persons if living, or if dead to their issue," that he read the word "surviving" as "surviving either in person or in his issue." He

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meant no more than that the estate tail held to have been created by the instrument was one which would subsist in the issue of a child who was dead when it came into possession. This is Lord Justice Cotton's view of the case. He says (1):—"The limitation to those surviving in person or in issue was referred to as to 'the effect of the cross remainders' implied, rather than as the construction of the words used." As the whole *ratio decidendi* in *Doe* v. *Waineright* (2) was based upon the remainder over upon failure of issue of *all* the daughters, the case is an affirmative authority in favour of the view I have adopted.

Before referring to the next case cited in argument, I desire to mention one which was not mentioned, and in which a result similar to that in *Doe* v. *Waineright* (2) was, by the assistance of the gift over, arrived at by reading as "other" words which strongly pointed to survivorship. I refer to *In re Tharp* (3). There there was a devise to the testator's three nephews, A, B, and C, for their respective lives, share and share alike, and after the death of any of them his share to go to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail, and in default of such issue "to *such* of my said nephews as shall survive, and to their and his issue, in the manner hereinbefore mentioned, and in case of the death of all my said nephews and their issue, I devise my said estate to my right heirs." It was held that the words "such of my said nephews as shall survive" should be read "my other nephews." The only question in the case which in the judgments is treated as arising, is whether the description of the nephews in the gift over was equivalent to "survivor or survivors of my said nephews," it being treated by both Knight Bruce, L.J., and Turner, L.J., as settled that the like words, if used, should be read "others or other."

In *Waite* v. *Littlewood* (4), the marginal note is not accurate. There, the gift was in trust for each of testator's daughters for life, and upon her death to her children, to be transferred and vested at twenty-one or marriage, and the gift over was that in case any of the daughters should die without leaving a child, who being a

(1) 7 Ch. D. 269.
(2) 5 T. R. 427.
(3) 1 De G. J. & S. 453.
(4) L. R. 8 Ch. App. 70.

son should live to attain twenty-one, or being a daughter to attain that age or be previously married, her share should go in trust for his "*surviving*" daughters, in equal shares if more than one, during their respective lives, and after their decease for their respective children, *per stirpes*, and not *per capita*, in the same manner as the original shares; and there was an ultimate gift over in case none of his daughters should have a child who being a son should live to attain twenty-one, or being a daughter, should attain that age or be previously married.

Thus, the gift over was to take effect only in the event of no child of a deceased daughter having taken a vested interest in her parent's share. It is true, as pointed out by Mr. Ronan that Lord Selborne, in giving judgment, indicated an opinion that the testator seemed to have meant that *whenever there was a failure of a particular stirps* the share of that *stirps* should accrue to the other *stirps*, and go in the same manner as the original shares. These words Lord Justice Cotton (1) explains as probably referring to what he thought might have been the idea floating in the testator's mind, and not as laying down a rule. Lord Selborne's reasoning in his judgment shows that he was as impressed as was any previous Judge with the three considerations to which I pointed at the commencement of my judgment. He expressed his opinion that, upon the whole scheme of the will, it was very improbable that the grandchildren were to take only if there should happen to be tenants for life to precede them. He pointed out the disposition of the Court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty, and he relied on the fact that the last of the daughters dying might die without leaving a child, in which case the word "surviving" read strictly could not apply, although the children of more than one of them, who might have previously died, might be living at her death, and that therefore the argument which was thought conclusive in *Smith* v. *Osborne* (2) applied, though with rather less force, because in that case there were two children only. Still, that that construction must be preferred which gave effect

(1) *Lucena* v. *Lucena*, 7 Ch. D. 255. (2) 6 H. L. Cas. 375.

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to the bequest over *in every case which might occur.*" In that case it was unnecessary to determine whether survivor meant "one who survived in person, or by children who took under the original gift," or simply "other." Either construction would support the decision.

Cooper v. *M'Donald* (1) was also a decision of Lord Selborne, upon a devise substantially similar to the limitations of the deed in *Doe* v. *Waineright* (2). There there was a series of specific devises upon trust for each of the testator's children for life, with remainder to the children of such tenant for life, as tenants in common in tail, with cross remainders between them, and failing such issue of the tenant for life in trust for the testator's other children equally, and the heirs of their respective bodies, as tenants in common; or if there should be only one of his said children *then living*, in trust for that child and the heirs of his or her body. Lord Selborne, says:—"By representation, and in a sense which probably is practical enough to be the most likely explanation of the frequent use of the word 'survivors' in a sense equivalent to 'others,' as I think I pointed out in the case of *Waite* v. *Littlewood* (3), where the intention of the testator is to provide for a *stirps*, if the *stirps* is living, the line of the parent is continued in the issue." The decision there was rested upon the context in which the expression occurred. The limitation which was to take effect upon failure of issue of the tenant for life was in trust for the testator's other children, as tenants in common in tail, so that those children, if more than one, took vested estates tail in remainder, whether they were or were not living at the time of the remainder coming into possession. Had there been nothing more in the will, and had there been but "one other child" of the testator, such child would have taken an estate tail in the entirety. The provision, however, then occurred, "Or if there shall be only one of my said children *then living*, in trust for that child and the heirs of his or her body." As in that case the heirs of the body of the child could take only in the event of there being an estate tail in the father, and the intention being clear that their taking was not to depend upon the contingency of their father surviving the period at which the remainder came into possession, the Lord Chancellor adopted the only con-

(1) L. R. 16 Eq. 258. (2) 5 T. R. 427. (3) L. R. 8 Ch. App. 70.

struction which would carry that intention into effect. But surely, if the devise there had been for life to the child, if then living or surviving, with remainder to *his* children in tail, so that they would take by purchase, and not by descent, it would have been equally held that the latter children took, although their parent had died before the remainder came into possession, and in that case it could only have been so held by reading "surviving" "others." The observations I have made on *Doe* v. *Waineright* (1) apply to this case also.

Wake v. *Varah* (2) followed *Badger* v. *Gregory* (3). It was cited merely for the statement in the judgment of Lord Justice James: "A whole category of cases has now settled that 'survivor' may be read 'other' or 'surviving stirps.'" And so, no doubt, it may: the question is, in which class it is to be read one way, and in which the other. How Lord Justice James would have read "survivor" in the present will may be gathered from his emphatic adherence to his decision in *Badger* v. *Gregory* (3), which in itself is sufficient to rule the present case.

The judgment of Hall, V.-C., in that case (4), so far from assisting Mr. Ronan, is a strong authority in support of the view I have already thrown out, of the estate for life given to the first devisee under the gift over accounting for the use of the word survivor. "To my mind," says the Vice-Chancellor, "the use of the word 'survivor' in a will of this kind is to be quite explained and accounted for, and justified, if I may say so, by the fact that the persons who were to take under the gift over were to take only for life, and then the fund was to go to the children. Hence the use of the word 'survivor,' because that is descriptive, and accords with the kind of estate which is to be taken by those persons who are only to take for life." His decision, however, there was based on the gift over.

In *Lucena* v. *Lucena* (5) the gift was in trust for all the testator's children equally, the shares of the sons (with an exception immaterial here) to be paid at twenty-five, and those of the daughters to be settled in trust for each for life, and after her

(1) 5 T. R. 427.
(2) 2 Ch. D. 348.
(3) L. R. 8 Eq. 78.
(4) 2 Ch. D. 350.
(5) 7 Ch. D. 255.

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death, if she should die leaving issue, for such issue equally, to be paid to them being sons at twenty-five, and being daughters at twenty-one or marriage; and the gift over was one which was held to be, that if a daughter should die without leaving any issue entitled to take under the prior trusts, then the share of such daughter was to be divided equally between the testator's *surviving* children, and to be paid and applied as in case of their original shares. There was also a gift over in the event of all his children dying under certain prescribed circumstances. The obvious distinction between that case and the present is the same as between the present and *Waite* v. *Littlewood* (1). There, as in *Waite* v. *Littlewood* (1), the gift over could not take effect so long as there were children of the deceased daughter entitled under the trusts of the original gift. Its operation was not, as it would be here, if the suggested construction were adopted, to divest the original gift to any of the testator's grandchildren, but was limited to take effect in events in which otherwise there would have been an intestacy. Sir George Jessel there certainly treats the rule to be that the "stirpital construction" is applicable to what he calls "the second class of cases," viz. where the shares of children are settled upon them for life with remainder to their children or more remote issue, with a gift over upon their death and upon failure of such children or more remote issue to survivors. I do not accurately know the exact class of cases he intends to comprise, but I think that by the words "failure of such children or more remote issue," he means failure of any children or more remote issue who would have taken under the original gift; and if that be so, this case has no application to the present. If he intended to indicate that the rule was applicable to such a case as the present, I can but say, with the utmost deference, that I am unable to agree with him that any such rule then was, and now is, established. He does not refer to any cases in support of it, except *Waite* v. *Littlewood* (1) and *Wake* v. *Varah* (2); and those cases do not support the proposition.

But Mr. Ronan's principal reliance was upon a passage in the judgment of the Court of Appeal: "If, with the gift over stand-

(1) L. R. 8 Ch. App. 70. (2) 2 Ch. D. 348.

ing as it does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is that the circumstance of the shares of some of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of 'survivors' in person or in issue taking an interest under the will"; and then these words occur, "though that would have been the effect of the gift to survivors if the shares of all the children, and not of some only, had been settled."

This opinion, however, is by the commencement of the sentence, carefully limited to cases in which not only the shares are settled, but in which "the ultimate gift over" is "only to arise in the event of a failure of all such issue who are objects of the testator's bounty." I cannot find that that case either purports to lay down, or affords any intelligent reason for laying down, any general rule of construction applicable to a case such as the present; nor can I treat it as overruling such cases as *Smith* v. *Osborne* (1), or *Badger* v. *Gregory* (2).

Benn v. *Benn* (3), so far from being an authority for Mr. Ronan's contention, tends the other way. There the absence of an ultimate gift over was made the *ratio decidendi* of Cotton, L.J. "It is said," says the Lord Justice, "that when all the shares are settled, and there is a general clause of accruer on the death of the tenant for life without children, the accrued shares being settled in the same way as the original shares, that is a sufficient indication of intention that 'survivors' meant 'others.' I am not aware of any such rule. No doubt such a scheme of disposition tends in favour of the view contended for." Then he adds, "and when it is followed by a gift over in the event of all dying without issue, there is sufficient evidence of an intention not to use the word 'survivors' in its proper sense."

Lastly, the decision of Vice-Chancellor now Lord Justice Kay, in *In re Bowman* (4), is inconsistent with the existence of the rule relied on.

(1) 6 H. L. Cas. 375.
(2) L. R. 8 Eq. 78.
(3) 29 Ch. D. 839.
(4) 41 Ch. D. 525.

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Upon the whole, my opinion is that the word "survivor" in the gift over must be read "other," that consequently the plaintiff is entitled, and that judgment must be entered for him, with costs.

Andrews and Murphy, JJ., concurred.

J. P. B.

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April 20, 21. May 1.

The defendants appealed (1).

Ronan, Q.C., Bourke, Q.C., and *Cullinan*, for the appellants:—

Down to the decision of *Waite* v. *Littlewood* (2) in 1872, "survivor" received its ordinary meaning of "longest liver," or it meant "other." Since then in cases where the shares are settled, it must receive its ordinary meaning, or it means "other," or the Court must adopt a stirpital construction. *Waite* v. *Littlewood* (2) is the foundation of the rule, and it was followed in *Wake* v. *Varah* (3); *Cooper* v. *M'Donald* (4); *Lucena* v. *Lucena* (5); *In re Benn* (6); *In re Bowman* (7). The shares of all the children here are settled, and therefore "survivor" cannot mean "other" and must receive a stirpital construction. It cannot receive its ordinary construction of "longest liver," as there is a clear gift over on the death of both. Assume as against us that you must give some meaning to survivor beyond that of living at a certain time, we submit that the survivorship refers to *stirpes*.

Where all the shares are settled as here, the word "surviving" must be construed not as "others" but as meaning those who survive actually in person or by representation in issue taking an interest under the will: *Badger* v. *Gregory* (8).

Meredith, Q.C., Bushe, Q.C., and *Redmond Barry*, for the respondent:—

According to the argument of the appellants the meaning of

(1) In the Court of Appeal, before Lord Ashbourne, C., and FitzGibbon, Barry, and Walker, L.JJ.
(2) L. R. 8 Ch. 70.
(3) 2 Ch. D. 348.
(4) L. R. 16 Eq. 272.
(5) 7 Ch. D. 255.
(6) 29 Ch. D. 839.
(7) 41 Ch. D. 525.
(8) L. R. 8 Eq. 78.

the words must be surviving the survivor. Then both the estates would go over both the accrued share and the original. The Chief Baron held that there was no such canon of construction as that.

Even when all the shares of the children are settled, no Court has decided that the stirpital construction must be adopted. The decision of Jessel, M.R., in *Lucena* v. *Lucena* (1), was overruled in the Court of Appeal (2) and it was held that the use of the word "survivors" had reference to those who survived the period when their shares became indefeasibly vested. In *Dunlevy's Trusts* (3), there was no gift over and "survivors" was read in its natural sense.

Jackson's Trusts (4), is in our favour and the judgment of the Court of Appeal in *Lucena* v. *Lucena* (2). We also rely on *In re Benn* (5), and *In re Bowman* (6).

The judgment of the Court of Appeal was delivered by— May 1.

FITZ GIBBON, L.J.:—

Sir George Jessel began his judgment in *Lucena* v. *Lucena* (2), in 1876, by saying that he was "rather surprised to find a new case on the words survivor or survivors." During the twenty years which have since passed, the cases have been as numerous as ever, and we have now to deal not only with a new case, but with a new difficulty, for we have not only to interpret a will, but to interpret and to apply several judgments of high authority, delivered upon other wills, which they were supposed to elucidate. The main contention of the appellant is that a new canon of construction, founded on Lord Selborne's judgment in *Waite* v. *Littlewood* (7), and enunciated in *Lucena* v. *Lucena* (2), rules the present case. It is admitted that the earlier authorities are adverse, so far as decisions upon different wills can rule the present matter.

I propose to deal with the case in the following manner:—First,

(1) 7 Ch. D. 255.
(2) *Ibid.* 268.
(3) 9 L. R. Ir. 349.
(4) 14 Ir. Ch. R. 472.
(5) 29 Ch. D. 839.
(6) 41 Ch. D. 525.
(7) L. R. 8 Ch. App. 70.

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to endeavour to ascertain the intention of our testator, Timothy O'Brien, from the language of his own will, apart from authority; secondly, to endeavour to apply the authorities before *Waite* v. *Littlewood* (1) to that will, and to ascertain the reasons and extent of their application to it; lastly, to examine *Waite* v. *Littlewood* (1) and the cases which have followed it, in chronological order, and to consider whether the construction or effect of the will which we have to construe, has been affected by any of those decisions. The cases which must be considered, and their dates, are: *Waite* v. *Littlewood*, 1872 (1); *Wake* v. *Varah*, 1876 (2); *Lucena* v. *Lucena*, 1877 (3); *In re Benn*, 1885 (4); and *In re Bowman*, 1889 (5).

O'Brien's will gave to his son Michael the lands of Ayle, and to his son Theobald the lands of Shrahane, "for their life use only;" after the decease of each of these sons, the property bequeathed to him was to go, in default of appointment, to the use of all his children, share and share alike, and to their respective heirs executors administrators and assigns, *i.e.* absolutely. Upon the death of either of these two sons without leaving any child or grandchild *him surviving*, the property bequeathed to such son so dying was to go over to the survivor of them, Theobald and Michael, such survivor in such case taking also a life estate only in said lands, with remainder to his children in default of appointment, and to go over in default of appointment, *as in case of their own original shares;* in case of the death of *both* Michael and Theobald *without leaving any child or grandchild him* (*sic*) *surviving*, the estates bequeathed to Michael and Theobald to go over to the testator's son Henry, for such life estate, with such power of appointment to his children, and with such remainder to his children in default of appointment, as was given to Michael and Theobald; and in case *all* his said sons should die *without leaving child or grandchild them surviving*, the properties bequeathed to his said sons respectively to go to the testator's daughters, Mary and Emma, their heirs executors and assigns, for ever, as tenants in common. As to "all his other property," the testator left certain

(1) L. R. 8 Ch. App. 70.
(2) 2 Ch. D. 348.
(3) 7 Ch. D. 255.
(4) 29 Ch. D. 839.
(5) 41 Ch. D. 525.

legacies, appointed his son Michael his residuary legatee, and bequeathed to him "all the rest, residue and remainder of his property of every kind and description, *not otherwise bequeathed* by his will."

Upon the argument, often used against a given construction, viz. that intestacy would result from it, it is to be observed that, strictly speaking, there can be no intestacy here, because there is an universal residuary disposition, and everything must go to somebody under this will. But the argument applies all the same to the specific dispositions of the lands of Ayle and Shrahane, for the testator plainly intended, and thought he had provided, that those lands should pass under the specific gifts out and out, and in every event, and should not in any event fall into his "other" or residuary property. The argument against any part of these lands, or any interest in them, falling into the residuary provision, is just as strong as if the will did not contain any such provision. In other words the testator did not mean his residuary disposition to affect those lands in any event; and any construction which would leave them, in any event, undisposed of by the previous provisions, must be adopted with the full consciousness that it involves the conclusion, never to be willingly adopted, that the testator has, *pro tanto*, failed to express his real meaning.

Another question always pertinent in construing any will is—Who are the objects of the testator's bounty? They are all, in this case, persons expressly named or described, as distinguished from objects taking merely by descent or representation.

Who are they, and in what order of preference do they come?

First, as to Ayle—Michael for his life; and after his death, Michael's children; and *pari passu*, as to Shrahane—Theobald for his life; and, after his death, Theobald's children. The first gift over on the death of *either* of these sons takes effect only upon his death without any child or grandchild *him surviving*. The second gift over, on the death of *both* sons, takes effect only in the event of both dying without leaving any child or grandchild *him* (*sic*) *surviving*. Therefore the only condition put upon any child of Michael or Theobald precedent to his becoming a first and absolute object of the testator's direct and vested bounty, is that he shall survive his own father, Michael or Theobald, as the case may be.

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The next objects in order are Henry for his life, with *such* remainder to Henry's children as was therein before given to Michael and Theobald; and the last objects, under the ultimate gift over, are the daughters Mary and Emma, who take nothing unless all three sons die without leaving child or grandchild them surviving. It is thrice repeated, as the only condition of a child of any son taking an original vested and direct gift to himself, that he shall survive his own father; and the mention of grandchildren goes farther, and suggests, if it does not imply, that even if any child of a son died in his father's lifetime leaving a "grandchild" who survived that father, the property would somehow benefit such grandchild, or, at all events, would not, in that case, pass away under the gift over.

These being the objects of the testator's bounty, and these being the events in which the successive gifts over were to take effect, we have the further matter of observation, continually mentioned in construing such wills, that the devolution of the accrued shares is expressly referred to that of the "original shares." Such a reference occurs as between Michael and Theobald and their respective children them surviving, and is repeated with respect to Henry and Henry's children.

Upon that will it is impossible to hold that the benefits to be taken by a child of Michael or Theobald on his father's death depended on the age at which the child might die if he had once survived his father; and this strengthens the conclusion that the benefit of an accrued share was not intended to depend upon the accident of the child's surviving his uncle as well. No doubt, the testator probably never thought of the event of such a child dying in infancy. But, if he had thought of it, he would have provided for that event as regards the parent's original share, and his omission to do so goes to show that death in infancy was not intended to deprive the child of his position as an object of bounty, whether original or accrued, otherwise given to him. Taking all the provisions of this will cumulatively, as we are bound to do, I am satisfied that it combines almost all the recognised elements for the conclusion that "survivor," as to Theobald and Michael, must be read as "other," and that any child of either, on surviving his own father, takes all the benefits given to him,

irrespectively of the date of his uncle's death, unless every case in which that construction has ever been adopted has been decided wrongly. Many cases so decided do not present all these elements; none presents them all so strongly as we have them here.

Mr. Ronan pertinaciously refused to discuss any of the gifts over in this will, except the one upon the death of Michael or Theobald without leaving any child him surviving. But no will can be construed in that fashion. The intention must be gathered from the whole will, and we must examine all its provisions before we decide the meaning of any one of them. Apart from all authority, it seems abundantly clear that this testator believed, first, that he had disposed out and out of the lands both of Ayle and of Shrahane in every event; secondly, that no part of those lands was to come down to his daughters, if any one of his three sons, irrespective of the order of their deaths, had left a child surviving him; thirdly, that nothing was to come down to Henry or Henry's children, if either Michael or Theobald, irrespective of the order of their deaths, had left a child surviving him. Lastly, that the original and accruing gifts were intended to coalesce, and to go in the same direction, so long as any object existed who took a vested interest in either the one or the other. As Michael left a child who survived him, and so took Ayle absolutely, it follows that both denominations were arrested in their descent by vesting in that child, and this result is attainable, and is completely attained, by reading "survivor" as "other" in the clause in question, but cannot be attained by any other or intermediate construction of that word.

The plaintiff represents Michael's child, and therefore takes as the only object in the first rank, unless the authorities coerce us to hold that she failed to take the lands of Shrahane because she did not also survive her uncle Theobald. Her taking or not taking those lands in no way depends on her own age at death; infant or adult, when she survived her father, Michael, she took his lands, and the defendant contends that there is a superadded condition, as to Shrahane, of her surviving Theobald too.

Secondly—What was the law up to *Waite* v. *Littlewood* (1)? I

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take it from an unquestionable authority, which is all the more applicable because it shows that the caution to be exercised in "changing words" was not inculcated for the first time by the more recent cases. In *Smith* v. *Osborne* (1) in the House of Lords, in 1857, Lord Cranworth says:—"I entirely approve of the rule now generally acted on, of giving to the word 'surviving' its ordinary and natural meaning, and not construing it to mean 'other.' Courts have no right to alter the language of a testator merely to effect what they conjecture him to have intended to say, when that is at variance with what he has in fact said. But the words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the Court to execute the intention however inartificially expressed. And here the language shows that *by the word 'surviving' the testator must have meant 'other.'* This is not a gift to a class, and on the death of one or more to the survivor or survivors; but a gift to two designated devisees—that is, the testator's two daughters, as tenants in common in tail, and if either should die without issue, then to 'the surviving daughter' and the heirs of her body."

I pause to observe that Michael and Theobald, and their respective children surviving them, are none the less "designated devisees" because the fee and inheritance of each denomination of land is divided into a life estate for the father, and a remainder in fee for the child who survives him.

Lord Cranworth proceeds:—"Unless the word 'surviving' is to be taken here to mean 'other,' the intention cannot be carried into effect, for he means his gift over to come into operation if either of his daughters dies without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter." That observation applies directly here.

He concludes:—"Add to which, the gift over to the testator's right heirs is only in default of 'such issue;' that is, *all* such

(1) 6 H. L. Cas. 393.

issue, which includes the issue of both daughters." This final observation applies infinitely more strongly to the successive gifts over in O'Brien's will, for he has expressly said that Henry is to take only if both Michael and Theobald die without leaving any child or grandchild surviving either of them, and that his daughters are not to take unless all three sons have died leaving no child or grandchild surviving any one of them.

When I examine the later cases, which are supposed to have brought in some new canon, and to have discovered a new meaning for "surviving," I find that in every one of them, wherever any one of these observations of Lord Cranworth applies to the will, it is repeated as a guide or clue to the construction, and though no one of these observations, alone and of itself, is treated as conclusive, with the possible exception of Cotton, L.J.'s *dictum* in *Lucena's Case* (1) no trace of authority can be found, and most certainly there has been no decision, to the effect that where all these observations coincide, or where such provisions exist as are combined in the present will, the conclusion ought to be avoided, or modified, that by "survivor" the testator must have meant "other." No doubt has been thrown upon the propriety of adopting this construction when it is required to give effect to an intention which, however "inartificially expressed," is made "plain." Furthermore, the tests for ascertaining whether this construction is necessary remain unquestioned, and I know no case in which the result of applying these tests is more clear than in the one now before us.

The canon of construction, which *Waite* v. *Littlewood* (2) and the subsequent cases are supposed to have laid down, is open, at the outset, to the remark that it does not give "surviving" its natural meaning, but a modified and intermediate meaning, which may contain some "idea of survivorship," but which introduces a far more artificial paraphrase of the word "surviving," than the old reading of it as "other." The phrase to be substituted for "other," as the *aliter* reading, and which is to be treated as expressing the testator's real intention, is "*surviving in person or in offspring.*" There may be wills which would enable or call

(1) 7 Ch. D. 255. (2) L. R. 8 Ch. App. 70.

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on the Court to say that the particular testators, when they *said* "surviving," really *meant* "surviving either in person or by a child or grandchild who survives the fall of the previous estate." But such an interpretation must have grounds to support it, and it must also be seen to carry out the general intention of the entire will. The appellant contends that by virtue of this new canon, without more, this intermediate construction must be adopted whenever all the separate estates in the original and accruing properties are settled, *i.e.* wherever the first taker of each share gets only a limited estate, and each descendant or subsequent taker takes by way of remainder, *i.e.* by direct gift from the testator. But reasons for adopting the construction even thus limited must, in every case, be found on the face of the will, and if the reasons so found lead to the further conclusion, as they do here, that the limited construction is insufficient to carry out the testator's intention, "survivor" must still be read as "other," as it was in the older cases.

Speaking for myself, I cannot understand the reason for the supposed distinction as to "settled," shares, where the descendant, or subsequent taker, is a designated object of bounty, and is introduced and described for the purpose of giving him a vested, though "settled," interest in an original share, and where he has satisfied every condition on which he is to take that share. "Survivor" has often been read "other" where the first takers took vested interests with an executory gift over, though their shares were not "settled." In such cases the descendants were not direct or express objects of the testator's bounty, yet their parents, the first takers, were put in funds, as it were, by reading "survivor" as "other," to give them property with which they might, or might not, provide for their descendants. Surely where the shares are "settled," in the sense of being given to the parents in the first instance for life only, and are afterwards given directly to the descendants, those descendants, as expressly designated objects of bounty, ought to be all the more favoured, in considering whether further benefit to them is to depend upon the accident of their parents surviving some third person, whose existence, or whose death at any given time, is immaterial to their own claim upon the testator. The supposed canon does not

commend itself to my mind as being founded upon any principle that I can understand.

But does it exist? What did Lord Selborne say, and what were the facts with which he had to deal, in *Waite* v. *Littlewood* (1)? He held in that case that survivor was not to be read in its natural sense; he gave the property to the *stirps* of a predeceasing taker. He said:—"The present case seems to me to have in it circumstances tending much more strongly than in most of the cases cited to the conclusion that the testator did not mean the gifts over to be dependent upon the accident of the survivorship of tenants for life whose children were to take after them. He seems to have meant that, wherever there was a failure of a particular *stirps*, the share of that *stirps* should accrue to the other *stirpes*, and go in the same manner as the original shares." On that observation I remark that our testator not merely "seems to have meant" this, he has said it expressly twice.

Lord Selborne goes on:—"I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word 'survivor' is to be read 'other.'" That observation introduces a valuable improvement upon the old form of expression "changing words," but it makes no change in the interpretation of wills. It puts the real question in the true form, viz.:— What did the testator mean by the word "survivor"? If you can find, from the will itself, that he meant something short of "other," by all means do so, give it his real meaning; but if the will before us cannot be construed so as to give effect to the testator's intention by ascribing any meaning to "surviving" short of "other," there is nothing in Lord Selborne's judgment, and I am convinced that he never intended to lay down any canon, justifying any new construction, or excluding from consideration any observation arising upon the will. I find no indication that he intended to lay down, as a rule of construction, that wherever shares are "settled," that circumstance alone binds the Court to read "surviving" in the intermediate sense of "surviving *per se vel per stirpem*." He forcibly observes on the very strong probability that anyone using the word "survivor" does not *precisely* mean "other" by it,

(1) L. R. 8 Ch. App. 70.

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but has in his mind some idea of survivorship. He truly says that a strong onus is cast upon anyone who says it is used merely by mistake for the word "other," but he points out that it often is an imperfect expression, and *if no explanation can be suggested*, he says that that is a strong argument against any construction that would reject the proper and primary meaning *altogether;* but he refers the decisions to the "just disposition of the Court in doubtful cases to lean to that construction which makes a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty." He therefore recognises this as the leading clue to the interpretation. Those objects here are any children of Michael or Theobald who survived their respective fathers, and no construction of O'Brien's will can make a complete provision for them, if, in the face of the gifts over, it deprives them of accruing shares. Again, he says: "The argument which was thought conclusive in *Smith* v. *Osborne* (1) applied though with rather less force, because in that case there were two children only." Here we have only two sons and their children surviving them respectively. He says further—"That construction must be preferred which gave effect to the bequests over in every case which might occur." Here the gifts over will take effect in every case only if we read them according to their terms, namely, as not sending the property over, unless no son has left any child or grandchild surviving him. This is first said as to Michael and Theobald, and is repeated as to the three sons in the ultimate gift over. He says again: "No one could read the sentence in question as a whole, and not see plainly and distinctly that the general intention of the testator was to keep the property together, and continually to subdivide the accruing shares between the same persons remaining who were to take the original shares, and to refer to the gifts of the original shares as the scheme which was to govern the devolution of the accruing shares." Our testator has twice expressly said this as "plainly and distinctly" as language can do so. Again, Lord Selborne says:—"The difficulty instead of being increased was very much diminished by the addition of the words, 'during their respective lives,' because, of course, a

(1) 6 H. L. Cas. 375.

tenant for life could not possibly take in possession unless he was living." This remark also applies to O'Brien's will. Lastly, he says:—"The reasonable construction was that there were to be tenants for life in the cases in which there were surviving daughters to take for life; *if not*, then the remainders to their children were to take effect. This construction was strengthened by that circumstance which has frequently been held conclusive that the whole was to go over in case none of his said daughters should have a child who should fulfil the specified conditions. *It could not go over if there had been a child of any daughter who fulfilled the conditions.* The fact of there being a residuary gift can make no difference." I can conceive no words more applicable or powerful then these to support the reading of "survivor" as "other" in our will, and in place of laying down any canon of construction adverse to the plaintiff in the present case, Lord Selborne seems to me to have based his judgment in *Waite* v. *Littlewood* (1) upon observations which he made upon the will before him, but everyone of which applies directly to the will now before us, and leads to the conclusion that "surviving" in this will cannot be read in its strict or natural sense, but must be read as equivalent in effect to "other." He pointed out no doubt that "surviving" sometimes need not be stretched to the full extent of "other," but that the intermediate construction will sometimes satisfy the testator's intention, and may be preferable because it "involves some idea of survivorship." This intermediate construction may be available in other cases, where the general intention is indicated that the subsequent takers of accruing shares must survive the period of accruer, and Lord Selborne seems to have desired to point out that the construction which he adopted in *Waite* v. *Littlewood* (1) did "involve an idea of survivorship." Our testator has expressed the idea of survivorship which he had in his mind, when he defined the qualification of the children of Michael and Theobald for becoming objects of his bounty, once and for all, as surviving their respective fathers. But *Waite* v. *Littlewood* (1) does not superadd the condition of surviving their uncles too, as a qualification for taking accrued shares upon the construction of O'Brien's will.

(1) L. R. 8 Ch. App. 70.

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The next case is *Wake* v. *Varah* (1). Hall, V.-C., decides in favour of the issue of a predeceasing daughter, "upon the frame of the will itself materially aided by the gift over." He says, "The use of the word 'survivor' is explained and justified by the fact that the persons who were to take under the gift over were to take only for life, and then the fund was to go to the children." He says, "That construction is placed beyond all reasonable doubt by the gift over." He says, "The Court leans to the construction which makes the disposition completely perfect, to the construction which provides in a sensible and reasonable way for the persons who are undoubtedly the object of the testator's bounty, particularly in the case of a parent who is making provision for his children and their issue." He says, "Those considerations prevailed in *Waite* v. *Littlewood* (2)," and the key of his judgment is in the passage, "It is not upon any technical reading of the word 'survivor' as intended to mean 'other,' but it is upon the whole construction of the instrument that I decide." There is no recognition of any new canon in this language.

In affirming this decision Baggallay, L.J., says, "The testator's three children and their issue were the primary objects of his bounty, and I think it a fair inference that he intended that there should be equality as between the three *stirpes*, and that, as regards each *stirps*, there should be a life estate, followed by a distribution of capital amongst the issue of the tenant for life. Had any one or more of his children predeceased the testator, their issue, if any, would have been entitled notwithstanding the failure of the life estate." He says (3), "If the literal interpretation be adopted, the title of the issue of a deceased child to participate in any benefit from an accrued share is made to depend upon the accident of their parent's surviving the brother or sister whose share is given over; a provision of a most capricious character, and entirely inconsistent with the intention of the testator as indicated by the original gift." He says that neither the consideration that a literal interpretation would lead to intestacy in particular events, nor the consideration that such an interpretation would lead to a construction which, if really intended, would be capricious, would justify the Court in

(1) 2 Ch. D. 348. (2) L. R. 8 Ch. App. 70. (3) 2 Ch. D. 354.

attributing to the language used other than its literal interpretation, unless satisfied upon consideration of the whole contents of the will, not only that the language used was insufficient to effect his full intention, but that the will itself afforded sufficient evidence of what his intention was. But he says that the gift over supplies the necessary clue, for "from this it is evident, not only that the testator intended to provide, and considered that he had provided, in the previous portions of his will, for all possible events in which any of his children might have issue, but also that it was his intention, if there was *any such issue, whether of one child or more*, that that issue should become entitled to his property." He holds that according to the true construction of the will, the share, as well accrued (if any) as original, of any child who should die without having issue, was to go over to the other children and their issue *per stirpes*, and to be enjoyed by them in the same course of devolution as their original shares. No observations could be more apposite to the will before us. All three Judges thought the case undistinguishable from *Waite* v. *Littlewood* (1), but none of them suggested that Lord Selborne had discovered any new meaning for "survivor," or had introduced any new canon. All made observations applicable to the present case. James, L.J., referred to the fact that the ultimate gift showed "the testator's intention to make a complete disposition of his property, extending to the contingency of the primary objects of his bounty *having all disappeared*, and showed that, in his own view of his previous dispositions, he had left *only that contingency* to be provided for." He said, "A whole category of cases has now settled that 'survivor' may be read '*other*' or '*surviving stirps*,' and has settled with reasonable clearness under what circumstances it may be so read, and no plain man, not a lawyer, would have had the slightest doubt in any of those cases that the real intention in the testator was effectuated thereby." This is a strong statement, but it lends no countenance to the existence of any new canon, of any separate category, or of any recognised construction, distinguishing the reading "other" from the reading "surviving in person or in *stirps*." Cleasby, B., said that the final clause sufficiently showed that the testator had

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in his mind the existence of the issue of any child, at the death of the longest liver, as a fact which would prevent the disposition from taking effect, just as here the testator has shown that if any child of any son survived his father, the daughters were to take nothing, and if any child of Michael or of Theobald survived his father, Henry and his children were to take nothing. The judgments all recognised the force and effect of the observations which arise upon this will, and which, when found applicable, have always led to the conclusion that "survivor" must be read as having the effect of "other."

The next and most important case is *Lucena* v. *Lucena* (1). It alone seems to give any ground for Mr. Ronan's argument, in Sir George Jessel's judgment, and in the *dictum* of Cotton, L.J., which has been so often quoted in argument, and which I must quote again. To test the bearing of that *dictum* on this case, I have placed the provisions of O'Brien's will in parallel columns with the bequests to Lucena's *daughters*, whose shares are all "settled," and I can find no difference between the two wills in form or frame, or in the gifts over, or in the references to the original shares. But there is an important difference in the description of the objects of bounty. The children of Lucena's daughters took vested interests, sons at twenty-five, and daughters at twenty-one or marriage, but not until then. The children of O'Brien's sons, on the contrary, took vested interests on surviving their respective fathers. In applying Cotton, L.J.'s, judgment, therefore, we must remember that the period of vesting was postponed, but under both wills the gift over could not take effect, according to its terms, if any one child took a vested interest under the previous gift. The Court of Appeal held, on Lucena's will, that "surviving" was not to be read in its strict sense, but was to be read in the full sense of "other." The share of the daughter who died childless, whose share was in dispute, was held to go equally in five shares—to one brother who survived in person, to the representatives of two brothers who had previously died, one without issue and the other leaving issue, and to the children of two sisters who had died leaving issue who were still living,

(1) 7 Ch. D. 255.

and had reached the ages for becoming indefeasibly entitled to their mother's original shares. Sir George Jessel observes, as I have done, that it would be a most extraordinary notion to attribute to the testator an intention that the mere fact of a parent, who only takes a life interest, surviving a given period, is to determine the title of his descendants to succeed to settled shares. He also observes on the provision that accruing shares were to go in the same manner as the original shares. But he reads Lord Selborne's judgment as meaning that "you may take 'surviving child' to mean a child who shall either actually himself or herself survive, or in respect of whom there should be survivorship by reason of a member of the stock descended from that child being alive at the time when the gift vests. It is," he says, "a modified survivorship." He seems to have assumed that the case was one of those which James, L.J., in *Wake* v. *Varah* (1), contemplated as falling into the category where "survivor" may be read "surviving *stirps*," and he treated that construction as "the governing rule" in the case. But he first discussed every provision of the will, and dealt with the arguments on the gifts over, the original shares, and the other clauses. In the result he divided the property in three shares among the surviving brother and the surviving children of the predeceased sisters. He did not say, though he may have thought, that any case in which "survivor" had been read as "other" generally, upon a will open to the observations which arise upon O'Brien's will, had been wrongly decided, but the Court of Appeal held that he was wrong in excluding the predeceased sons upon Lucena's will, and it seems to me to follow that he would have been equally wrong if he had excluded any predeceased child of a predeceased daughter who had lived to attain a vested interest in his or her mother's original share, and if so he would have been wrong if he had, upon O'Brien's will, excluded the present plaintiff. The reversal of his judgment, if I am right in this, involves a decision in favour of the present plaintiff, and the appellant's construction of Cotton, L.J.'s, *dictum* would be inconsistent with the decision of the Court and with the judgment in which it occurs. With this remark I

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pass to that judgment. Cotton, L.J., first fixes the periods at which the original shares were to vest indefeasibly. He shows that *Waite* v. *Littlewood* (1) is "no authority" where some of those shares are settled, and others are given absolutely, for attributing to "surviving" the construction "surviving actually in person or figuratively in issue taking an interest under the will." He says, as I have done, that probably Lord Selborne was "rather referring to what he thought might have been an idea floating in the testator's mind than laying down a rule" applicable to "a case like the present." He points out the reasonableness of saying that "survivors" has reference to "those who survived the period when their shares became indefeasibly vested," and the whole judgment, and especially this observation, indicates to my mind that, upon Lucena's will, the Court of Appeal would have not excluded any child of a predeceased daughter who had attained the prescribed age, and so taken an indefeasibly vested interest in his or her mother's original share, though such child had predeceased the first taker of the accruing share, even if the settled shares of the daughters had been the only shares given by the will. If so, any child of Michael or Theobald O'Brien who survived his father must be equally entitled under O'Brien's will. I am strengthened in my construction of Cotton, L.J.,'s judgment by the passage which immediately precedes the *dictum* on which Mr. Ronan's argument depends. He says—"The fact of shares being settled, and the fact of the ultimate *gift over* being only to arise in the *event of a failure of all* children and issue who are *objects of the testator's bounty*, are circumstances each of which may properly be relied upon as showing that 'survivors' is not to receive its strict construction. Each of these circumstances exists in the present case." What warrant does this observation offer for attributing to Cotton, L.J., a construction which would exclude any child of a daughter who had once indefeasibly taken the mother's share, or for our excluding any child of Michael or Theobald who had done likewise? But then comes the Delphic *dictum*. It is as hard to interpret as any will that has ever raised the question which it is alleged to have settled! "If, with the gift over standing as it

(1) L. R. 8 Ch. App. 70.

does, there had been no settlement of the daughters' shares, we are of opinion that the word 'surviving' would not have received its strict construction, and must have been construed 'other'; and our opinion is that the circumstances of the shares of *some* of the children named in the will being settled is not sufficient to give to the word 'surviving,' as a matter of construction, the meaning of 'survivors' in person or in issue taking an interest under the will"—This is the decision. On Lucena's will the intermediate construction is inadmissible; "surviving" must be read as "other," generally and in the widest sense. We therefore must clearly see that some plain reason appears for reading it otherwise in O'Brien's will. Whether Cotton, L.J., would have held the settlement of all the shares alone to be such a reason depends on the meaning of the closing words of the sentence, viz. "though that would have been the effect of the gift to survivors, if the shares of all the children and not of some only had been settled." If by "*though*" he meant "even if," or "assuming that," or if by "the gift to survivors" he meant "a gift to survivors" without other clues to the testator's intention, such as that children surviving their own parents were express objects of the testator's bounty, or that original and accrued shares were expressly directed to go in the same manner, or if he merely meant to make some hypothetical concession to the authority of Sir George Jessel, whom he was overruling, this ambiguous *dictum* would become natural enough, and would not decide this case. But if he meant that, on Lucena's will, if it had contained the settled gifts to the daughters only, he would, merely because all the shares were settled, have read "surviving" so as to exclude the children of a predeceased daughter who had reached the prescribed ages, and had taken indefeasible vested interests in their mother's shares, from participating in the accruing share of an aunt who survived them, I can neither accept the *dictum*, nor understand the principle of it, nor reconcile it either with the older or the subsequent decisions. Nothing short of this construction will avail the appellant here, for Michael O'Brien's child, whom the plaintiff represents, is identically in the same position as a son of one of Lucena's daughters, who had survived his mother, and had attained twenty-five, but predeceased his aunt.

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I think we have Cotton, L.J.'s own own authority for holding that he did not mean what is attributed to him, for in *Benn's Case* (1) which was decided on the absence of a gift over, such as we have here, though he says that he is not aware of any rule that "when all the shares are settled, and there is a general clause of accruer on the death of the tenant for life without children, the accrued shares being settled in the same way as the original shares, *that is a sufficient indication* of intention that 'survivors' means 'others'": he adds, "no doubt, such a scheme of disposition *tends in favour* of the view contended for, and when it is followed by a gift over in the event of all dying without issue, *there is sufficient evidence* of an intention not to use the word 'survivors' in its proper sense; but whether a scheme of disposition of this kind without a gift over is sufficient evidence of such an intention is a very different matter." He refers to *Waite* v. *Littlewood* (2) and to the settlement of the shares and the gift over as the grounds of Lord Selborne's judgment. He quotes his own judgment in *Lucena* v. *Lucena* (3), and he concludes:—"It is not there said that the fact of the shares being settled *would have been enough* to vary the meaning of the word 'surviving,' though *it was held enough when combined* with the ultimate gift over." If so, I ask why is it not to have the full meaning of "other" here, when all the circumstances which I have mentioned combine to show that the general intention can not be otherwise effectuated, and when earlier cases of the highest authority have consistently given it that meaning where similar circumstances exist.

Lindley, L.J., says, "The argument on the appeal has mainly turned on the observations of Lord Selborne in *Waite* v. *Littlewood* (2), but Lord Selborne cannot have looked at the will in that case without reference to the gift over." Then, I ask why are we not to look at all the provisions which tend to show that "survivor" must mean "other" here; and when we find that these circumstances have in other cases been held sufficient, why are we to assume that these cases have all been overruled? Fry, L.J., says that the appellants relied on two circumstances, viz. the settlement of the gifts over in the same way as the original

(1) 29 Ch. D. 844. (2) L. R. 8 Ch. App. 70. (3) 7 Ch. D. 255.

shares, and that, owing to the absence of a residuary gift, construing "surviving" in its proper sense might produce intestacy. He does not find that the cases go any further than to say that the first of these circumstances was to be regarded; and that the second was to be regarded in construing doubtful expressions, but was *not enough* to induce the Court to give an unnatural meaning to a word. Moreover, he says there were expressions in the will which were against the appellants. According to Lindley, L.J., "the dispositions were rational and intelligible if they gave to the word 'surviving' its proper meaning"—which accordingly they did; but that case is no authority for holding that where, as here, there are no expressions in the will indicating any other construction than that which gives the whole property to any one child of Michael or Theobald who survives his father—where such a child is a direct object of bounty—where the accrued shares are expressly directed to go in the same manner as the original shares—and where two successive gifts over show that they are not to come into operation if any child of either brother survives his father, we can stop short of "other" as the meaning of "surviving."

The last case, *In re Bowman* (1), at least shows that it was the opinion of Kay, J., that where children are expressly mentioned as principal objects, without doing violence to the words, children of sisters generally, not of surviving sisters only, are to take, and that in cases where, after similar limitations, there is a gift over on the death of all the tenants for life without leaving children or issue, it is settled by a long series of authorities that the children of a tenant for life may participate in a share of another tenant for life who dies without issue after their parent. It may be imprudent to follow his example by endeavouring to lay down any definite "propositions" as established by the "consensus of authority." But the propositions with which he concludes his judgment go far to support our opinion that, notwithstanding anything said in *Lucena* v. *Lucena* (2), "survivor" must still be read "other," whether all the shares are settled or not, where there is such a combination of circumstances upon the face of

(1) 41 Ch. D. 525. (2) 7 Ch. D. 255.

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the will as exists here, showing an intention in favour of any child who has survived his own parent, though he has not survived the first taker of the accruing share.

It was right to discuss this case fully in the Court of Appeal, having regard to the authorities which it was necessary to review, but I feel that all I have said is but a repetition, in different language, and in somewhat different order, of the reasoning of the Lord Chief Baron in the Court below. The appeal must be dismissed with costs, and it is unnecessary to inquire whether the plaintiff would not, in any event, have been entitled to succeed in another capacity, even if unsuccessful in the present contention.

Solicitor for the plaintiff: *Francis M. Fitt.*
Solicitor for the defendants: *William Leahy.*

R. D. M.

H. L. 1896. April 30.

AARON'S REEFS (LIMITED) *v.* TWISS (1).

Company — Prospectus — Misrepresentation — Shareholder — Repudiation of contract — Forfeiture of shares.

APPEAL by the plaintiffs from the judgment of the Court of Appeal (2), whereby, the Court being equally divided, the unanimous judgment of the Exchequer Division was affirmed.

Levett, Q.C., and *Edward Ford* (both of the English Bar), for the appellants.

Ronan, Q.C., *The Right Hon. E. Carson, Q.C.*, and *W. R. Edwards* (of the English Bar), appeared for the respondent, but were not called on.

THE HOUSE OF LORDS (Lord Halsbury, L.C., and Lords Herschell, Watson, Macnaghten, Morris, and Davey) dismissed the appeal with costs.

Solicitors for the appellants: *Chave & Chave.*
Solicitor for the respondent: *E. J. Bellord.*

(1) W. N. [1896] p. 52. (2) Reported [1895] 2 I. R. 207.

M'LAUGHLIN *v.* CHAMBERS (1).

Appeal.
1895.
Nov. 14.

Parliament—Registration of voters—Inhabitant occupier—Landlord living on premises—Dwelling-house—Lodger.

Where the Revising Barrister finds as a fact that a voter, during the qualifying period, separately occupied as a separate dwelling-house, two rooms on a flat in a tenement house, having the exclusive control of the said rooms, and the use of the stairs, yard, &c., in common with the other inmates of the tenement house, the fact that the landlord also resided in the house does not *per se* as matter of law disfranchise the voter.

Where the inmates of such a house are otherwise duly qualified, in order to deprive them of the franchise as inhabitant householders, the landlord must so reside upon the premises as to retain his quality of master, reserving to himself a general control and dominion over the whole structure.

APPEAL by John M'Laughlin from the decision of Mr. Kehoe, Q.C., Assistant Revising Barrister for the borough of Londonderry, expunging the names of the appellant and certain other persons from the list of persons entitled for the said borough.

The name of John M'Laughlin appeared on the list No. 17, for the east division of persons entitled to vote for the borough of Londonderry, his place of abode being 45, Bridge-street, the nature of his qualification being stated as inhabitant "householder," and the qualifying premises being described as "Two rooms first flat, 45, Bridge-street." The said John M'Laughlin who is in this report and in the case stated by the Revising Barrister called "the voter" was duly objected to.

The case stated having set out the voter's name, place of abode, qualification, and qualifying premises as given above proceeded as follows:—

"The facts hereinafter stated with reference to the position of this voter apply to the cases of all the persons who are named in the schedule hereto, with some trifling differences in the situation

(1) Before SIR PETER O'BRIEN, L.C.J., PALLES, C.B., and FITZGIBBON, BARRY, and WALKER, L.JJ.

Appeal. 1895. M'LAUGHLIN v. CHAMBERS.

of the rooms, rent paid, and other matters not materially affecting the position of the question at issue. They were all duly objected to and appealed.

"The voter has been in occupation and tenant of two rooms on the first flat of 45, Bridge-street, for nine years. He is tenant to a Mrs. Kennedy, who was a tenant of the whole house from the landlord prior to his becoming her tenant, and she then, and has since resided in two rooms of the same house on the ground floor.

"There are two rooms above the voter's flat, which are also let by Mrs. Kennedy to a tenant.

"The persons are all of the labouring class, and the house is one which would be described as a tenement house.

"The dust-pit, the water-closet, the yard and stairs are used in common, but the rooms occupied by Mrs. Kennedy and by the voter and by the tenant of the rooms above him are all occupied by them separately and distinctly as their respective dwellings.

"They have each their separate key of their separate rooms, and the absolute and exclusive control over them, and they are occupied by them and their families exclusively. The furniture is theirs. The outside door is opened by the first person who happens to go out in the morning and remains ajar all day, so that all the occupiers can go in and out, and is locked at night by the person who happens to go in last, and all parties have equal right and control over the outer door, dust-pit, water-closet, yard and stairs.

"Mrs. Kennedy gives no service or help of any kind to the voter or the tenant above him, and each of the occupiers cleans and keeps their respective apartments in order, and they each in turn week about clean the stairs and other portions of the premises which they use in common. Whenever the dust-pit is cleaned, each tenant and Mrs. Kennedy pays his or her share of the expense.

"The landlord of Mrs. Kennedy keeps the premises in repair and pays all taxes. Mrs. Kennedy has a slight profit on the money which she pays to the landlord.

"There is no difference whatever in the mode of occupation of the voter from what it would be if Mrs. Kennedy resided in the adjoining house, save that in that instance whatever tenant Mrs.

Kennedy might have in the rooms she now herself occupies would take his share of the cleaning of the parts used in common, and of the expense of the cleaning of the dust-pit instead of Mrs. Kennedy, as at present, and there could not and would not be any difference in the mode of occupation and enjoyment of the premises, if M'Laughlin happened to be the tenant to the landlord and Mrs. Kennedy was the sub-tenant to him.

"On the above evidence I came to the conclusion and found as a fact that the voter had during the qualifying period the sole and exclusive control of his said part of the house 45, Bridge-street, and that he had during such period separately occupied his said part of the house 45, Bridge-street, as a separate dwelling-house, and I would have decided that he was entitled to remain on the list and have retained him on the list as an inhabitant occupier, but I felt myself coerced by the authority of *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2), and accordingly expunged the voter's name from the list.

"If I was wrong in doing so the Court will restore it.

"I also expunged the names of all the parties mentioned in the schedule hereto on the same grounds. If I was wrong in M'Laughlin's case they are to be restored."

Here followed the schedule.

Wylie, Q.C., and *Healy*, for the appellant.

Ross, Q.C., and *Cooke*, for the respondent.

SIR PETER O'BRIEN, L.C.J. :—

The question which, as I understand the matter, the Revising Barrister has reserved for us is, whether there is anything in the cases of *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2), which necessarily compelled him to decide that the appellant is not an inhabitant householder but a lodger. We are all of opinion that there is nothing in these cases which *compelled*—I use this word advisedly—the Revising Barrister to hold that this man was a lodger.

The case states that "the voter has been in occupation and tenant of two rooms on the first flat of 45, Bridge-street, for nine

(1) 8 Q. B. D. 195. (2) 20 L. R. Ir. 344.

Appeal. 1895. M'LAUGHLIN v. CHAMBERS. Sir P. O'Brien, L.C.J.

years. He is tenant to a Mrs. Kennedy, who was a tenant of the whole house from the landlord prior to his becoming her tenant, and she then, and has since resided in two rooms of the same house on the ground floor. There are two rooms above the voter's flat, which are also let by Mrs. Kennedy to a tenant. The persons are all of the labouring class, and the house is one which would be described as a tenement house. The dust-pit, the water-closet, the yard and stairs, are used in common, but the rooms occupied by Mrs. Kennedy and by the voter and by the tenant of the rooms above him are all occupied by them separately and distinctly as their respective dwellings.

"They have each their key of their separate rooms, and the absolute and exclusive control over them, and they are occupied by them and their families exclusively. The furniture is theirs. The outside door is opened by the first person who happens to go out in the morning and remains ajar all day, so that all the occupiers can go in and out, and is locked at night by the person who happens to go in last, and all parties have equal right and control over the outer door, dust-pit, water-closet, yard, and stairs. Mrs. Kennedy gives no service or help of any kind to the voter or the tenant above him, and each of the occupiers cleans and keeps their respective apartments in order, and they each in turn week about clean the stairs and other portions of the premises which they use in common. Whenever the dust-pit is cleaned each tenant and Mrs. Kennedy pays his or her share of the expense. The landlord of Mrs. Kennedy keeps the premises in repair and pays all taxes. Mrs. Kennedy has a slight profit on the money which she pays to the landlord; there is no difference whatever in the mode of occupation of the voter from what it would be if Mrs. Kennedy resided in the adjoining house, save that in that instance whatever tenant Mrs. Kennedy might have in the rooms she now herself occupies would take his share of the cleaning of the parts used in common, and of the expense of the cleaning of the dust-pit instead of Mrs. Kennedy, as at present, and there could not and would not be any difference in the mode of occupation and enjoyment of the premises if M'Laughlin happened to be the tenant to the landlord, and Mrs. Kennedy was the sub-tenant to him."

Having thus stated the facts the Revising Barrister proceeds

to state his findings as follows:—"On the above evidence I came to the conclusion, and found as a fact that the voter had during the qualifying period the sole and exclusive control of his said part of the house 45, Bridge-street, and that he had during such period separately occupied his said part of the house 45, Bridge-street, as a separate dwelling-house, and I would have decided that he was entitled to remain on the list as an inhabitant occupier; but I felt myself coerced by the authority of *Bradley* v. *Baylis* (1) and *Hogan v. Sterrett* (2), and accordingly I expunged the voter's name from the list." That is to say as far as he could draw an inference of fact, he found that M'Laughlin had a separate dwelling, but he considered that as matter of law the decisions of *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2) coerced him to hold that the residence of Mrs. Kennedy in the same structure constituted M'Laughlin a lodger and not an inhabitant householder.

Now it has been decided in more cases than one, in this Court, that where the landlord has let out a house in tenements, his residence in the house, without more, does not necessarily disqualify the other inmates. The judgments of the Judges in *Hogan* v. *Sterrett* (2) appear to me, if not to lay down the doctrine expressly, at least to state it inferentially; and two reported cases, *M'Cay* v. *Chambers* (3), and *Charlton* v. *M'Manus* (4), are express authorities upon the matter. I shall quote from my judgment in the latter case:—"I was myself at first a little exercised by Form 34, and certainly the language of the Master of the Rolls in *Hogan* v. *Sterrett* (2) seems to indicate that having regard to that Form he looked upon the fact of the landlord residing in the house as an almost conclusive test whether his tenants were lodgers or inhabitant occupiers. He refers to the Form, and what he says seems to bear out what Mr. Ross contended for. 'I think that is a legislative recognition of the decision in *Bradley* v. *Baylis* (1). The effect of that is, that he *need* not return the names of the occupiers under the circumstances specified; while in the corresponding English Form, which by section 18 of the English Registration Act of 1885 (48 Vict. c. 15)

(1) 8 Q. B. D. 195.
(2) 20 L. R. Ir. 344.
(3) 21 I. L. T. R. 69.
(4) 29 I. L. T. R. 16.

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is substituted for that previously in use under "The Representation of the People Act, 1884," it is provided that the landlord in such a case "*must* not" return the names of the occupiers. There is no practical difference in this connexion between "need not" and "must not"; and the effect of either Form is to show that if the landlord lives in the house, the other persons residing in it are not qualified as inhabitant occupiers, and therefore need not be so returned. That is a statement of the law by the Act of Parliament itself, and I think it makes no difference that these Forms may, in Ireland, be altered by the Lord Lieutenant in Council. The Form prevents the owner of property from returning the names of persons of the description mentioned who are on his property, and it keeps off the registry every person so described. I regard that as conclusive that the Legislature adopted the view of the law taken in *Bradley* v. *Baylis* (1) and *Morfee* v. *Novis* (2).' That language, as I have said, seems to bear out Mr. Ross. But Fitz Gibbon, L.J., does not take the same view; I refer to what he says:—'It appears at once how vital to this question the owner's residence on the premises is. It may not be decisive in every case, but I certainly think it will be so in most cases.' That shows that the Lord Justice did not hold the matter to be conclusive, though very important. What Barry, L.J., says is to the same effect:—'The corresponding Form for Ireland (48 Vict. c. 17, Form 34) says, "*need* not return," which is I think the most accurate expression, as it was not intended to subject the landlord to penalties if he did return the names of other occupiers. It is not necessary, in my opinion, to attach any more force to that direction than was attached to it in the argument by Mr. Sullivan, who admits that in 999 cases out of 1000 the man would be a lodger under such circumstances.' Thus the learned Lords Justices do not go at all as far as the Master of the Rolls. They regard the residence of the landlord on the premises as an important element, but not a conclusive test." The judgment of the Lord Chief Baron in *Charlton* v. *M'Manus* (3) clearly lays down the proposition that the residence of the landlord in the house affords no conclusive test in cases of this kind. Having

(1) 8 Q. B. D. 195. (2) 8 Q. B. D. 200. (3) 29 I. L. T. R. 16.

referred to the cases of *M'Cay* v. *Chambers* (1) and *Hogan* v. *Sterrett* (2), and to the judgment of Jessel, M.R., in *Bradley* v. *Baylis* (3), he says:—"Therefore there is a complete agreement of authority in England and Ireland that the residence of the landlord in the premises does not *per se* necessarily and as matter of law disqualify the other inmates of the premises."

What, then, is the test that shows whether a person is an inhabitant householder or a lodger? The answer is given by Maule, J., in *Toms* v. *Luckett* (4). "I think the spirit of the decisions is this:—Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive control of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying a part of it occupies it as a lodger only, and not as tenant within the meaning of the 27th section. The effect of the party having or not having a key of the outer door is not decisive of the question. If he has a key I cannot conceive that the circumstance of other persons enjoying the same privilege can make any difference. He would only have a right of way, which would be in no degree affected by his having it in common with others. But the question depends upon whether or not the owner of the house resides upon the premises, retaining his quality of master, and reserving to himself a general control and dominion over the whole. If he does the inmate is a mere lodger." Very much to the same effect are the remarks of Lord Kinnear in *Bishop* v. *Duffy* (5). He says, in explaining *Bradley* v. *Baylis* (3), that the Judges in that case had laid down as a rule that where a house is let out in unfurnished apartments, separately occupied by tenants, and their landlord does not reside in the house, and has no servant in the house to look after it for him, the tenants are not lodgers but householders; whilst, on the other hand, when the landlord resides in the house, or has a servant in it to look after it for him, and retains to himself the general control as master of the house, he is

(1) 21 I. L. T. R. 69.
(2) 20 L. R. Ir. 344.
(3) 8 Q. B. D. 195.
(4) 5 C. B. at p. 38.
(5) [1894] 22 R. 192.

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to be considered as the occupying tenant, and the other inmates as merely lodgers.

I turn now to the case of *Miller* v. *Horish* (1) decided in this Court of which a short note is given in Mr. Lawson's book of Registration Cases at p. 358. The facts may be shortly stated: A person occupied two rooms in a farmer's house, and had to pass through the kitchen, which was occupied by the farmer's son, who looked after the farm for his father. On these facts the Revising Barrister held that the inmate of the two rooms occupied them as his house, and that the fact that the same could only be reached by passing through the kitchen did not prevent him from being entitled to a vote as the landlord did not reside in the house. But this Court unanimously reversed this decision, and in giving judgment I find from Mr. De Versan's note that I ventured to say:—"In my opinion, on the decided cases the Revising Barrister was wrong. The father through his son had a control over the house." I then referred to the language of Brett and Lindley, L.JJ. in *Bradley* v. *Baylis* (2), which I shall presently read. The Lord Chief Baron concurred. He said:—"The only difficulty in this case is the interpretation of the words used by the Revising Barrister. The question reserved is whether the fact that the rooms occupied by the respondent could be reached only by passing through the kitchen, disentitled the respondent to a vote as an inhabitant occupier 'as the landlord did not reside in the house.' The case finds that this kitchen was occupied by the son of the farmer, who looked after the farm for his father. Now, if this means that the occupation of the son was as servant to his father, the control involved in his occupation of this room would, in my opinion, as matter of law, plainly constitute the respondent a lodger, and therefore disentitle him to a vote as inhabitant householder. On the whole I think this is the meaning of the case. The decision of the Revising Barrister should therefore be reversed." Fitz-Gibbon, L.J., said:—"The question in these inhabitant householders' cases is, whether what the claimants occupy is a dwelling-house — one dwelling-house or separate dwellings. The two questions here are—1, Whether all this was one dwelling-house?

(1) Lawson's Notes, 1885–1893, p. 358. (2) 8 Q. B. D. 195.

It is so called all through the case; 2, Whether this integral portion was in fact and law, in the occupation of the landlord? It is clear that the son, that is, the landlord, occupies, unless we hold that personal occupation is necessary. The son must have been looking after the lodgers." From these judgments it is quite plain that in *Miller* v. *Horish* (1), the test applied by this Court was whether the landlord retained control over the premises. I now proceed to read the passages in the judgments in *Bradley* v. *Baylis* (2), to which I there referred. Brett, L.J., says (at p. 234): "What then is the difference between the modes of occupying a room as a lodger or as a householder? To occupy the room as a lodger, you must lodge in another man's house. There cannot be an exhaustive definition of what will make a man a lodger, but the matter has been considered very much in three cases, all of which are in the seventh Manning and Grainger. In those cases, the distinction was made to turn upon the ownership of the key of the outer door. In one case the owner of the house had the key of the outer door, and he resided in the house: *Pitts* v. *Smedley* (3). Held that a person who occupied the rooms in that house, was a lodger with him. In another of those cases, the owner had let part of the house, reserving no actual control over it, and he did not keep for himself the key of the outer door: *Score* v. *Huggett* (4). Held, that the person occupying the part of the house, occupied it as a householder, and not as a lodger. And the third was a case where the owner had the key of the outer door, but the person who occupied part of the house had a key also: *Wansey* v. *Perkins* (5). Held, that such person was a lodger. If you substitute in those cases the consideration of the owner of the house preserving a control over it, then the distinctions drawn in those cases will remain as very good guides. If the owner of the house reserves to *himself a control over it* (which he does if he resides in part of it, and where there is only the use of the passages and staircases given to the inmates to whom he lets the rest of it, or if he does not reside in it, yet if he, by his servants, performed any duties in the house, or undertakes a certain control): any person who occupies only a

(1) Lawson's Notes, 1885–1893, p. [358.
(2) 8 Q. B. D. 195.
(3) 7 M. & G. 85.
(4) 7 M. & G. 151.
(5) *Ibid.* 151.

Appeal. 1895. M'LAUGHLIN v. CHAMBERS. Sir P. O'Brien, L.C.J.

part of that house as his tenant, may be properly said to be a lodger with him. But if the owner of the house has entirely left the house, and has given up the actual occupation of it to other people, not reserving any part of the actual occupation of it to himself, *nor any control* over any part of it, then, although in truth those persons are not occupying a house, but only a part of a house, they may, if other conditions are fulfilled, be said to occupy 'a dwelling-house' within the definition of 41 & 42 Vict. c. 26. Cavillers may say that such nice distinctions look exceedingly like nonsense. I can only answer, that if Judges seem to talk nonsense, it is because Parliament has written nonsense." The gist of that is that he refers the difference between lodgers and inhabitant occupiers to the control retained by the landlord of the house in the case of the former. Lindley, L.J., says (at p. 245):—"The distinction, then, between tenants who are not lodgers and tenants who are lodgers, must be discovered from other sources than the Statutes, and it is extremely difficult to draw the line between them. At the same time, the word 'lodger' involves the idea of lodging with some one else from whom he hires the lodging, whilst the word 'tenant' does not involve, although it does not exclude this idea; and this difference gives the clue to the distinction which the statutes have made. Taking this difference as a guide, it appears to me that where a house is wholly let out in unfurnished apartments, separately occupied by tenants, and their landlord does not reside in the house, and has no servant in the house to look after it for him the tenants are rateable and are not lodgers: whilst, on the other hand, where a house is let out in unfurnished apartments to tenants, *and their landlord resides in the house, or has a servant in it to look after it for him*, then it appears to me that such tenants are not rateable, and are lodgers." From the last sentence I have read, I think it is plain that Lindley, L.J., intended to put the distinction upon the question of control.

On the facts stated in the present case I do not think that Mrs. Kennedy had any control at all over the house as against this claimant. Therefore, whatever case you look at—be it *Bradley* v. *Baylis* (1), or *Hogan* v. *Sterrett* (2), or any of the many other

(1) 8 Q. B. D. 195. (2) 20 L. R. Ir. 344.

cases decided on this point in this Court—I am clearly of opinion that there is nothing in these cases declaring this man disentitled to the franchise. Mr. Ross has pressed us strongly, urging that if we once allow the franchise to a man whose landlord resides in the same structure with him, and reverse the decision of Mr. Kehoe, we will have different revising barristers drawing different conclusions from the same facts. That may be so. As long as human nature is human nature the inferences that will be drawn from given materials must depend upon the idiosyncrasies of the tribunal that has to draw the inferences; and as long as there is evidence to support the finding of fact arrived at by a revising barrister this Court cannot interfere.

PALLES, C. B.:—

I should like to call attention to the fact that this Court has no function to perform in hearing a registration appeal except to determine questions of law. It follows that once the Revising Barrister has found the facts, we have no jurisdiction to deal with this finding unless there is no evidence on which it can be sustained.

Mr. Ross has argued that in other cases, where the same facts have been proved in evidence, persons in the same position as the appellant in this case have been held not to be entitled to the franchise, and that therefore the Revising Barrister was bound to disallow the vote. I was surprised to listen to this argument after the pointed way in which, in *Gormley* v. *Buchanan* (1), Lord Justice Barry has shown what the duty of this Court is when the facts are found by the Revising Barrister. No doubt, in jury trials, where the verdict must largely depend upon the idiosyncracies of the jury, injustice might be worked by findings of fact, were the Court powerless to set them aside; and hence was early found in our law the need of the corrective principle, whereby Judges are enabled to set aside any particular verdict as being against the weight of evidence. But when the Legislature constituted this Court a Court of Appeal, to review decisions of

(1) [1894] 2 Ir. R. at p. 310.

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Revising Barristers, they thought proper that the revision should be limited to matters of law.

Having premised so much, let me come to the matter in question here. The Revising Barrister has found, as a fact, that the rooms out of which the votes were claimed were occupied as separate dwellings; but he adds, that as the landlord resided in another portion of the same structure, he felt himself coerced by *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2) to disallow the votes. Upon the assumption that there was evidence to sustain his finding that these rooms were occupied as separate dwellings, it is admitted that the conclusion which the Revising Barrister drew from *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2) is wrong, because neither of these cases decides that the mere fact of the residence of the landlord in the structure in which his tenants reside is enough *per se* as matter of law to disqualify the tenants. Therefore, in truth, Mr. Ross and Mr. Cooke were driven to argue that there was no evidence on which the finding of the Revising Barrister that the qualifying premises were occupied as separate dwellings could be sustained.

The subsidiary sub-facts stated in the case are as follows: —"They have each their key of their separate rooms, and the absolute and exclusive control over them, and they are occupied by them and their families exclusively. The furniture is theirs. The outside door is opened by the first person who happens to go out in the morning, and remains ajar all day, so that all the occupiers can go in and out, and is locked at night by the person who happens to go in last, and all parties have equal right and control over the outer door, dust-pit, water-closet, yard and stairs. Mr. Kennedy gives no service or help of any kind to the voter or the tenant above him, and each of the occupiers cleans and keeps in order their respective apartments, and they each in turn week about clean the stairs and other portion of the premises, which they use in common. Whenever the dust-pit is cleaned each tenant and Mrs. Kennedy pays his or her share of the expense. The landlord of Mrs. Kennedy keeps the premises in repair, and pays all taxes. Mrs. Kennedy has a slight profit on the money which

(1) 8 Q. B. D. 195. (2) 20 L. R. Ir. 344.

she pays to the landlord. There is no difference whatever in the mode of occupation of the voter from what it would be if Mrs. Kennedy resided in the adjoining house, save that in that instance whatever tenant Mrs. Kennedy might have in the rooms she now herself occupies would take his share of the cleaning of the parts used in common, and of the expense of cleaning the dust-pit, instead of Mrs. Kennedy, as at present, and there could not and would not be any difference in the mode of occupation and enjoyment of the premises if M'Laughlin happened to be the tenant to the landlord and Mrs. Kennedy was the sub-tenant to him."

In other words, the Revising Barrister finds that although it happens that Mrs. Kennedy is landlord, yet her user is identically the same as it would have been if she were tenant in the same way as the claimants are tenants. Thus her position is identical with that of the landlord in *Charlton* v. *M'Manus* (1). In that case the landlord came into possession of part of a structure by reason of the tenant of a separate room therein quitting possession and giving the same over to the landlord who came to live there, and we held that the mere residence of the landlord in the same structure did not of itself disqualify the tenant of another room occupied as a separate dwelling-house, who had been, previous to the arrival of the landlord on the premises, admittedly entitled to be registered as an inhabitant householder. In that case I endeavoured to show that *Bradley* v. *Baylis* (2) did not establish that the presence of the landlord in a house set out in tenements does not of itself determine the question whether a person is a lodger or an inhabitant householder. I want now to go a little further, and to point out what is the determining factor. The real question involves this—"Is there but one dwelling-house, or is the structure one in which there are two or more separate dwelling-houses? Cotton, L.J., in *Bradley* v. *Baylis* (2), says:—"Now, what is a lodger? I do not intend to try to give that which will be an exhaustive definition of a lodger. I have had to consider it several times in this Court, and in my opinion there is involved in the term 'lodger' that the man must lodge in the house of another man, and lodge with him. With

(1) 29 Ir. L. T. R. 16. (2) 8 Q. B. D. 195.

Appeal. 1895. M'LAUGHLIN v. CHAMBERS. Palles, C.B.

respect to lodging in the house of another man, there is no difficulty about that; what constitutes his lodging with the landlord is the difficulty. In my opinion it is not necessary that the person with whom he lodges, that is, his immediate landlord, should live in the house to make him a lodger. Nor is it necessary that the immediate landlord should have the exclusive control over the key of the outer door; but, in my opinion, some control must be exercised by the person in whose house a man lives to make him a lodger." I do not define the relation of landlord and lodger, but it must involve some personal relation. I admit that it could be implied from the fact of occupation of rooms.

In my opinion the rule laid down in *Bradley* v. *Baylis* (1) is this:—Where a claimant dwells in rooms forming part of a structure, in any other part of which structure the landlord dwells, and over which structure the landlord exercises a control as master—a paramount governing control, which is to be attributed to his position as master, and which is something different from that of a man who merely occupies rooms in the same structure—then every one of the tenants in the structure or house is a lodger.

But then we are told that we are making a new departure in so deciding. If in *Miller* v. *Horish* (2) a stranger and not the son of the landlord had been in occupation of the kitchen, the case would have been different; but the landlord's son being as servant to the father, his father, the owner of the house, was there as master. I said in giving judgment:—"The case finds that this kitchen was occupied by the son of the farmer, who looked after the farm for his father. Now, if this means that the occupation of the son was as servant to his father, the control involved in his occupation of this room would, in my opinion as matter of law, plainly constitute the respondent a lodger, and therefore disentitle him to a vote as inhabitant householder."

Thus, in a case in which we reversed the Revising Barrister, we held that the question was one depending entirely upon the control exercised. Is it not idle, after that decision, to say that we are now making a new departure?

Next, the decision in the Scotch case of *Bishop* v. *Duffy* (3) is

(1) 8 Q. B. D. 195. (2) Lawson's Notes, 1885–1893, p. 358.
(3) [1894] 22 R. 192.

held up to us as something for us to imitate. That case did no more than, in 1894, go upon the principle upon which we had acted in 1893. The ultimate matter upon which that case was decided was that the principal tenant not only resided in the house but retained that control over the other inmates, which belonged to the master of the house, because he had exclusive possession of the door key, so that the other inmates could not go in or out without appealing to him.

I consider that, upon the evidence before the Revising Barrister, it was competent for him to have determined in either of two ways. He could have determined that the amount of control exercised by Mrs. Kennedy was different from that exercised by her tenants, and that it was a control not capable of being attributed to her as being in the same position as her tenants. If he had so determined I should not have touched his decision; because, when there is actual control exercised, it may be that it is part of the control of the landlord reserved, and not the same control as that of the tenant merely. But, on the other hand, it was open to him to draw the conclusion that the amount of control exercised by Mrs. Kennedy was exactly the same as that of the other inmates, and not the paramount control of master. He has drawn this conclusion as a matter of fact, and we cannot reverse this part of his decision; but he has drawn a wrong inference as matter of law from the cases of *Bradley* v. *Baylis* (1) and *Hogan* v. *Sterrett* (2), and we must so declare in reply to the question he has stated for our decision.

FITZGIBBON, BARRY, and WALKER, L.JJ., concurred.

Solicitor for the appellant: *O'Doherty.*
Solicitor for the respondent: *Caldwell.*

G. Y. D.

(1) 8 Q. B. D. 195. (2) 20 L. R. Ir. 344.

Land Com. 1895.

June 26.

Appeal. Nov. 20, 21. 1896. Feb. 28.

O'DONOVAN, Claimant; EARL OF KENMARE, Respondent (1).

Landlord and tenant—Landlord and Tenant (Ireland) Act, 1870—*Land Law (Ireland) Act*, 1881—*Demesne land—Residential holding—Holding expressed to be let for temporary convenience—Letting for life of tenant—Compensation for improvements—Compensation for disturbance.*

In an estate map made in 1814, the lands of Newtown, then held under a lease dated April 3, 1811, for thirty-one years or three lives, were described as "a handsome demesne," and in a map of the adjoining townland the lands bounding it on one side were called "Newtown demesne." The lessee in the lease of 1811 was described as "Esquire," but the parcels demised, which included other lands than those the subject-matter of the present case, were called "the ploughlands of Newtown and C." In 1852 the lands of Newtown, which had been for some time in landlord's hands, were let to O'L. for a term of thirty-one years, at a rent of £1 5*s.* per acre, under an agreement for a lease which was to contain usual husbandry covenants, with provisions that the tenant was to put and keep the house and premises in repair, and that the landlord was to have power to resume portion, not exceeding 10 acres, for building purposes. On O'L.'s death the holding passed to his widow as his executrix and devisee, and she remained in possession till her death, February 18, 1894. In 1883 the term of thirty-one years agreed to be granted in 1852 expired, and ejectment proceedings were brought by the landlord to recover the holding. The proceedings were defended, but the matter was settled by Mrs. O'L. agreeing to take a lease of the holding "as demesne lands only, for her own life," paying an increased rent of 5*s.* an acre free of county cess and taxes. The lands were always used as an ordinary agricultural farm. On the death of Mrs. O'L. the landlord required possession of the holding from her executor, who made a claim before the County Court for compensation for disturbance and improvements. The County Court Judge awarded compensation on both grounds. Both parties appealed to the Land Commission:—

Held, by the Land Commission, that the lands were not demesne lands, nor a residential holding, nor a letting for temporary convenience, so as to exclude the holding from the benefit of the Land Acts, and that the executor of the deceased tenant was entitled to compensation for improvements and for disturbance.

(1) Before Bewley, J., and FitzGerald, Q.C., and O'Brien, Commissioners.

The landlord having appealed to the Court of Appeal :—

Held, by the Court of Appeal, Walker, L.J., *diss.* (reversing in part the decision of the Land Commission), that the executor of the deceased tenant was not entitled to compensation for disturbance.

APPEALS by claimant and respondent to the Irish Land Commission from the County Court Judge of the West Riding of Cork.

The facts appear fully in the judgment of Mr. Justice Bewley.

P. D. Fleming, for the claimant.

Bourke, Q.C., and *Morphy*, for the respondent.

BEWLEY, J. :—

This case came before the Court on appeals brought by the claimant and respondent respectively from an order of the County Court Judge of the West Riding of Cork, dated 18th April, 1895, made under the provisions of the Landlord and Tenant (Ireland) Act, 1870, and the Land Law (Ireland) Act, 1881, upon a claim by Frederick H. O'Donovan, the executor of the late tenant, for compensation for disturbance and improvements in respect of part of the lands of Newtown, Co. Cork. By this order after reciting that the claimant had established his claim for disturbance to the extent of £320, and his claim for improvements for the several sums therein mentioned, amounting to £482, and that the respondent had established his set-off for rent and costs to the amount of £195 9*s.* 8*d.*, it was adjudged that after deducting the said sum of £195 9*s.* 8*d.* from the sum of £802 (the aggregate amount established of the said claims), there was due by the respondent to the claimant the sum of £606 10*s.* 4*d.* in respect of the said claims, which sum the respondent was thereby ordered to pay to the claimant with the sum of £20 19*s.* 6*d.* for costs, and £4 4*s.* for witnesses' expenses. The claimant submits that the amount awarded for compensation is insufficient, while the landlord, the respondent, by his notice of appeal contends that the holding in respect of which the claim has been made is, first, demesne, or, secondly, a residential holding, and not agricultural or pastoral in its character, or, thirdly, is a holding that was let

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for temporary convenience within the meaning of the Landlord and Tenant (Ireland) Act, 1870, and the Land Law (Ireland) Act, 1881; and in the alternative that the amount awarded should be reduced. In addition to these objections Mr. Matthew Bourke, counsel for the landlord at the hearing before us raised another question, going to the root of the entire claim. The tenancy under which these lands were held came to an end on 18th February, 1894, by the death of Mrs. Ellen O'Leary, who held for her own life, and the claim for compensation has been made by Mr. F. H. O'Donovan, her executor; and it is urged that as Mr. O'Donovan is not and never was tenant of the lands and no disturbance of the possession took place until after Mrs. O'Leary's death, the claims for compensation for disturbance and improvements cannot be maintained. The evidence shows that by a lease of 3rd April, 1811, made by the then Earl of Kenmare to Michael Murphy (described therein as "Esquire"), the lands of Newtown, constituting the present holding, with the lands of Clashdangan, were demised to Mr. Murphy for a term of three lives or thirty-one years at the yearly rent of £236 of the then currency. Estate maps made apparently in 1814 have been produced containing a very highly coloured representation of the lands of Newtown with the words "a handsome demesne" written on it, and in a map of the adjoining townland the lands bounding it on one side are called "Newtown demesne." This is the only evidence so far as I can make out that the holding was ever called or known as demesne land; and I have often found in the county Cork and elsewhere in Ireland the lands attached to a house occupied by a gentleman of good social position popularly referred to as demesne. In the lease of 1811, already mentioned, which was current when these maps were made, the parcels demised were called "the ploughlands of Newtown and Clashdangan," and there is no reference in the lease to demesne lands or mansion house or indeed to any dwelling-house, although such, undoubtedly, then existed. For some years prior to 1852 the lands of Newtown were in the hands of Lord Kenmare, the lease of 1811 having, as I suppose, been either surrendered or evicted; and in the month of May, 1852, an arrangement was made through Mr. Thomas Galwey, the then agent of the estate, to let

the lands to Mr. Cornelius O'Leary, a trader in the town of Bantry, which is in the immediate neighbourhood of the holding. On the 18th May, 1852, Mr. Galwey wrote to Mr. O'Leary as follows:—

"KILLARNEY,
"18*th May*, 1852.

"DEAR SIR,—After you left this morning I brought your proposal for Newtown under the notice of Lord Kenmare. His Lordship is willing to lease the whole of the denomination to you on the following terms:—The rent per acre, £1 5*s*. You are to put the house and premises in good tenantable repair, and keep them so, and also to keep up all fences and other improvements on the premises or hereafter to be made. Term, thirty-one years, or until bankruptcy or insolvency or the appointment of a receiver. The lease to contain a clause against assigning or subletting without licence. Lord Kenmare to have the power at any time to resume portion of the said lands bordering on the sea, not exceeding 10 acres, for building purposes for himself. This claim is not likely to be acted on, but it will be inserted in order to give his Lordship an opportunity to build if at any time he should be disposed to do so. . . . Possession to be given at once. The term to commence from 1st May, last past. Husbandry clauses to be in the lease, the chief of which, and indeed the only one which shall particularise the amount of cultivation, is that two successive grain crops are not to be raised off any portion of the lands without intermediate manuring for a green crop. In the event of a breach of this clause a rent of £10 an acre to be paid for any portion of the land from which two such crops shall be taken. No part of the land exceeding one-fourth to be turned up during the last four years of the tenancy."

That is addressed to Mr. O'Leary, Bantry. A draft lease was accordingly prepared by the solicitor for Lord Kenmare, and a copy of it dated 28th May, 1852, was approved of by Mr. O'Leary, who signed the following memorandum at foot:—"I agree to execute a lease of which a copy is contained in the foregoing eight folios, to each of which I have affixed my initials when the acreable contents of Newtown have been ascertained accurately, I getting immediate possession. I agreeing to hold the farm upon the terms as to rent per acre, and in all other respects as hereinbefore mentioned." The lease contained the husbandry clauses referred to in Mr. Galwey's letter as well as others, and a covenant by the lessee that he would not during the term occupy or carry on any other farm or lands without the consent in writing of the lessor, and that he would personally inhabit

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and occupy the farm-house; and also a covenant that he would at his own cost put into and maintain in good and substantial condition and repair during the term the said houses and out-offices, and all the glass, windows, woodwork thereon, &c. There was also a covenant by the lessee on receiving six calendar months' notice to surrender any part or parts of the land required by Lord Kenmare for building or planting not exceeding ten acres in the whole, getting a proportionate abatement in the rent. This lease was essentially an agricultural lease, and the evidence establishes that the subsequent user of the holding was that of an ordinary agricultural or pastoral farm. The circumstance that the rent reserved is an acreable rent affords strong evidence that the parties did not regard the dwelling-house as the principal subject-matter of the letting. On the death of Mr. Cornelius O'Leary the holding passed to his widow, who was his executrix and devisee, and remained in her occupation until her death in February, 1894. In 1883 the term agreed to be granted in 1852 expired by effluxion of time, and an ejectment was brought by Lord Kenmare to recover possession of the holding. Defence was taken by Mrs. O'Leary, and in my opinion she ought to have succeeded in her defence as being deemed to be a tenant of a present ordinary tenancy from year to year by virtue of the 21st section of the Land Act of 1881. But many questions that have since been decided by the Court of Appeal in reference to demesne land, residential holdings, and lettings for temporary convenience were then unsettled and matters of doubt, and Mrs. O'Leary being an old lady without children, unwilling to be involved in litigation and desirous of remaining in the holding for the remainder of her life, was induced by Mr. Leonard, acting on behalf of Mr. Hussey, Lord Kenmare's agent, to sign the following agreement:—"Heads of the agreement under which Mrs. E. O'Leary is to continue to hold the lands of Newtown. First, to get a lease as demesne lands only, for her own life with liberty to Lord Kenmare to take up ten acres for building purposes during the above term, Mrs. O'Leary being allowed an acreable rent for any portion taken away. Mrs. O'Leary to pay an increased rent of 5*s.* an acre from 25th March, 1884, free of county cess and other taxes, save landlord's proportion of income tax and poor

rate. Lease to contain the usual clauses as to keeping the premises in repair, and reserving to the landlord all the trees now upon the lands. I hereby agree to the above, and hereby declare it binding on me. Dated the 18th October, 1884. Signed ELLEN O'LEARY, Newtown." This agreement was entered into by Mrs. O'Leary without any professional advice; but, as she never seems to have questioned it, it must be taken as having operated as a surrender of her existing present tenacy from year to year and the creation of a future tenancy for her life. The provision that she should take a lease of the lands "as demesne lands only" was obviously intended in an indirect, and I might almost say, insidious manner, to deprive her of any right to compensation for disturbance; but if the lands were not in fact demesne at the date of the lease the insertion of these words in the agreement was, in my opinion, inoperative. In the case of *Stott* v. *Cramsie* (1) a lease contained a covenant which, while providing that a lessee should not make any claim under the Landlord and Tenant Act, 1870, for a certain class of improvements, affirmatively recognised his right to claim for buildings erected with the consent of the lessor and for unexhausted tillage and manures—a right which could not exist except on the basis that the holding was agricultural or pastoral, or partly agricultural and partly pastoral; but it appearing from the evidence that the holding was of a residential nature the Court of Appeal held that it could not be treated as within the fair rent provisions of the Land Act of 1881, and dismissed the tenant's originating notice to have a fair rent fixed. In my opinion the holding in the present case was not at the passing of the Land Act nor at any time subsequently demesne land, nor was it a residential holding, and the parties to the letting of October, 1884, could not by any contract give to the holding a character it did not possess. The parol and documentary evidence, including in the latter the correspondence prior to the agreement of 1884, appear to me to prove conclusively that from the date of the letting to Cornelius O'Leary down to the present time the holding has always been an ordinary agricultural or pastoral holding. The objections grounded on the

(1) 27 I. L. T. R. 57.

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allegation that the holding was let to be used for temporary convenience also fails, in my opinion, inasmuch as to exclude a holding from the benefits of the Landlord and Tenant Act, 1870, under the 15th section of that Act, sub-section 4, it must not only be let, but be expressed in the document by which it is let, to be let for temporary convenience. And if it is sought to exclude the holding from the provisions of the Land Act of 1881 by virtue of section 58, sub-section 7, any such letting made after the passing of the Act must be by contract in writing expressing the purpose for which such letting is made.

There remains the fourth objection founded upon the fact that Mrs. O'Leary was only tenant for her own life. The argument is put in this way. The right to claim compensation for disturbance and for improvements under the Act of 1870, is given to the "tenant of a holding." The 70th section of the Act contains a definition of tenant, viz. "The term 'tenant' in relation to a holding shall mean any tenant from year to year and any tenant for life or lives or for a term of years under a lease or contract for a lease . . . and where a tenancy of any person having been a tenant under a tenancy which does not disentitle him to compensation under this Act is determined or expiring, he shall, notwithstanding such determination or expiration, be deemed to be a tenant, until the compensation, if any, due to him under this Act, has been paid or deposited, as in this Act provided." But this last clause, it is said, can have no application except to some person who has at one time been actually tenant, and cannot aid Mr. O'Donovan, who is only the personal representative of the deceased tenant. This argument, if sound, would lead to extraordinary results. A tenant *pur autre vie* is admittedly entitled to claim compensation for disturbance and improvements, and if Mrs. O'Leary had transferred her interest in the farm in her lifetime her assignee would undoubtedly be entitled to maintain the present claim. If, on the other hand, Mrs. O'Leary had been evicted in her lifetime for non-payment of rent she would have been entitled to full compensation for improvements. But it is contended that because she retained possession of the holding until her death and paid her rent, all the valuable improvements made by her and her predecessors in title must now be forfeited to the landlord! The objection is in my

opinion unsustainable. Prior to the passing of the Landlord and Tenant Act, 1870, a tenant had no interest or property in any improvement made by him on the holding, not being in the nature of tenant's fixtures, other than that which he had in the land itself. He was entitled to the use and enjoyment of the lands and improvements during the continuance of his tenancy, but when the tenancy came to an end he was bound to deliver up to the landlord the holding and all the improvements on it save such fixtures as he was entitled by law to remove. The improvements were treated as accretions to the soil and became the property of the landlord, who was under no legal obligation to make any compensation to the tenant for them. The effect of the Act of 1870, in respect of holdings not subject to the Ulster Custom or any corresponding usage was that the tenant of any holding which was agricultural or pastoral with certain exceptions, mentioned in sub-sections 2 to 5, of section 15, acquired a specific interest in the improvements made by him or his predecessors in title, entirely distinct from his term or estate in the lands, subject, however, to the qualifications contained in the 4th section of the Act. In the recent case of *Brew and Glynn* v. *Stackpoole* (not yet reported) (1), the Court of Appeal has decided that this right to compensation for improvements passed to a mortgagee under a deed charging "all the tenancy, estate and interest" of a tenant in a holding, and the interest which Mrs. O'Leary had in the improvements on her holding, made by her or her predecessor in title, in my opinion, clearly became vested in Mr. F. H. O'Donovan, her personal representative, even though the tenancy determined by her death. Similar considerations appear to me to apply to the claim for disturbance. This is a right arising from the mere possession of the holding irrespective of the term or estate of the tenant in the lands, and although it is contingent until an act of disturbance takes place, it is an interest, which in my opinion, also passes to the personal representative of the deceased tenant. No legal grounds, therefore, appear to me to exist against the prosecution of the claim for disturbance and improvements made by Mr. O'Donovan, and it is necessary to consider the particulars and

(1) Since reported—[1896] 2 I. R. 29.

Land Com. 1895. O'Donovan v. Kenmare. Bewley, J.

amounts of these claims. We are all of opinion that having regard to the circumstances of the case, the maximum amount of compensation for disturbance should be awarded, viz. £477 12*s.* equal to three years' rent, instead of the sum of £320 given by the County Court Judge. With respect to the claim for improvements there is no doubt that a considerable sum of money was expended on the holding by the late Mr. C. O'Leary. In April, 1865, at a time when no right to compensation for improvements existed Mr. O'Leary at the request of the agent of the estate, Mr. Thomas Galwey, furnished to him particulars of the amounts alleged to have been expended by him at Newtown. Those particulars were in the form of a bill of quantities with prices attached, and they have been made the basis of the present claim for improvements. As Mr. O'Leary by the agreement entered into in 1852 had contracted to put the dwelling-house into good and substantial repair, the expenditure claimed in respect of the dwelling-house which was made in fulfilment of his contract cannot form the subject of compensation and was properly disallowed by the County Court Judge. As to the other portions of the claim for permanent buildings, including gate piers, Mr. Fitz Gerald and I are of opinion that the sums of £400 and £30, awarded by the County Court Judge should be increased to £580. In arriving at this conclusion we have of course had regard to the present value and not the original cost of the improvements. The sums of £32 given for reclamation and £20 for crops and unexhausted manures were in our opinion proper sums to be allowed, and the order will remain unaltered in that respect. We are of opinion, however, that in addition to the sums of £181 14*s.* 9*d.* and £13 14*s.* 11*d.* allowed to the landlord for rent and costs, there should be allowed as a further item a set-off of the sum of £130, for the proportionate part of the rent of the holding from 29th September, 1893, to 18th February, 1894, the date of Mrs. O'Leary's death, and for mesne rates from that date until the possession of the holding was given up in October, 1894. On the hearing before us it was alleged that Mr. O'Donovan was entitled to certain small credits out of the rent in respect of rates and taxes, and if satisfactory evidence of the payment of these is given before our order is drawn up the necessary modifications in the amount of the set-

off will be made. Subject to this, the order will stand as follows: Compensation for disturbance, £477 12*s.*; compensation for permanent buildings, including gate piers, £580; reclamation, £32; crops and unexhausted manures, £20; and costs and expenses awarded by the County Court Judge, £25 3*s.* 6*d.* making a total of £1134 15*s.* 6*d.* As against that there is as a set-off: rent to September, 1893, £181 14*s.* 9*d.*; ejectment costs, £13 14*s.* 11*d.*; and further rent and mesne rates to October, 1894, £130, making a total of set-off of £325 9*s.* 8*d.* and leaving a balance payable to Mr. O'Donovan of £809 5*s.* 10*d.* Mr. O'Donovan is also entitled to the costs of the appeal.

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O'DONOVAN *v.* KENMARE.

Bewley, J.

By leave of the Court of the Irish Land Commission the landlord appealed to the Court of Appeal (Lord Ashbourne, C., and Fitz Gibbon, Barry, and Walker, L.JJ.)

Appeal. Nov. 20, 21. 1896. Feb. 28.

Ronan, Q.C., and *Bourke, Q.C.* (with them *Morphy*), for the appellant:—

The order of the Land Commission Court is wrong so far as it awards compensation for disturbance. Mrs. O'Leary was tenant of this holding for her own life. She died. Her executor has been evicted by the landlord. It is not possible to say within the meaning of sect. 3 of the Landlord and Tenant Act (Ireland), 1870, that Mrs. O'Leary was a tenant "disturbed in her holding by the act of the landlord." Being a tenant for her own life only, she could not be "disturbed" after her death. No doubt "tenant" under the definition clause in the Act of 1860 would, in some cases, include the tenant's executor, and provision is made by sect. 70 of the Act of 1870 for deeming a person *who has been a tenant* a tenant still until he is paid the compensation to which he is entitled under the Act. But neither of these provisions help Mrs. O'Leary's executor, because under the circumstances of this case there could be no special occupant. Her executor took no estate or interest in her tenancy. Sect. 70 was intended to give protection to a person who was entitled to compensation under the Act, not to confer a title to compensation

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where it did not otherwise exist: Butt's Landlord and Tenant, p. 39. There is no analogy between the circumstances under which the Act gives compensation for improvements and compensation for disturbance. Compensation for improvements is given to the tenant "on quitting his holding" in all cases; compensation for disturbance is given only when the quitting is caused by the act of the landlord disturbing the tenant in his holding.

[They also argued that the letting made to Mrs. O'Leary was a letting for temporary convenience, and that the lands were demesne lands.]

Wright, Q.C., and *Bushe, Q.C.* (with them *P. D. Fleming*), for the respondent:—

The only lessees excluded by sect. 3, sub-sect. (3), from compensation for disturbance are tenants under leases granted for a term certain of not less than thirty-one years. Mrs. O'Leary's tenancy is therefore within the section. She was accordingly within the meaning of sect. 70 a tenant under a tenancy which did not disentitle her to compensation under the Act. That tenancy is determined by Mrs. O'Leary's death, but by the express provisions of the section she is, notwithstanding such determination, to be deemed to be a tenant until the compensation to which she is entitled under the Act is paid to her. The tenancy so imputed to Mrs. O'Leary by the statute, at the moment of her death descended to her personal representative, and he has been disturbed in his holding by the act of the landlord demanding possession, and for this disturbance he is entitled to compensation. It is a similar case to *Roe* v. *Cooney* (1). The statute makes no difference between the title of the respondent to compensation for improvements and his title to compensation for disturbance. There is no reason why Mrs. O'Leary's personal representative should not have the same rights as her assignee, and the latter, as tenant *pur autre vie*, would be entitled to compensation for improvements.

The Court intimated that they did not require to have the other questions raised by the appellant argued.

Cur. adv. vult.

(1) 14 L. R. Ir.. 243.

Lord Ashbourne, C. :—

This is an appeal from the Land Commission, and raises an interesting point on the construction of the Land Acts. The Land Commission awarded as compensation for improvements £632, and as compensation for disturbance £477 12*s*. Mr. Ronan, for the appellant, abandoned all objection to the award of compensation for improvements, and we, during the argument, intimated to him that we concurred with Mr. Justice Bewley's judgment as to the lands not being demesne, or held for temporary convenience, and directed him to confine himself to the one point—was the personal representative of the deceased tenant, Mrs. Ellen O'Leary, entitled to make any claim for disturbance?

The facts essential to the determination of this narrow legal point are few and simple. The other topics, no longer in controversy, may be left out of view in order to concentrate attention on the short question, Can compensation for disturbance be claimed by the personal representative of a deceased tenant of a holding held for the term of her own life?

Mrs. Ellen O'Leary was tenant of the lands in question under a lease for her own life, and on her death on the 18th February, 1894, the tenancy admittedly ceased. Mr. O'Donovan never was a tenant of the lands, and on a writ being served for possession after Mrs. O'Leary's death, he very properly allowed judgment to go by default.

The 3rd section of the Land Act of 1870 enables a tenant of a holding to claim compensation for disturbance if "he is disturbed in his holding by the act of the landlord."

Here the tenant is dead, and the tenancy ceased on her death. After the 18th February, 1894, there was no tenant and no holding. Can the taking of possession after that date by the landlord be regarded as a disturbance of a tenant in his holding by the act of the landlord? Must not there be some person to be disturbed who answers the description of "tenant," or who, at least (as in the case of an overholding tenant), has been a tenant? Must not there be some act of disturbance—something which can be regarded as an act of disturbance by the landlord of a tenant? Here the landlord did nothing during the lifetime of the tenant; he did nothing while the tenancy lasted. Can it be maintained

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that his taking possession—with or without legal proceedings—when the tenancy had ceased is an act of disturbance of the tenant, who was then dead?

Supposing the tenant had died intestate, and no administration had been taken out to her, what would the landlord have been disturbing—what would have been his act of disturbance, if he had then quietly walked into an unquestioned and undisputed possession of the lands? Or, if the landlord, having so taken possession, supposing a personal representative had been raised to the tenant after (say) five years, could he commence administration by claiming damages for disturbance in respect of the landlord's act of taking quiet possession? Mr. Ronan showed wisdom in abandoning objection to the compensation for improvements. It would have hampered him in arguing against the compensation for disturbance, and the two claims rest on entirely different grounds. The claim for improvements depends on the work and expenditure of the tenant himself, and is payable "on quitting the holding," whether by act of the tenant or of the landlord, whilst the claim for disturbance depends entirely "on an act of the landlord."

Some anomalies have been pointed out, if the appellant's contention on this point is assented to, but they are not more surprising than those that could be indicated if it was rejected. It is idle, in interpreting this difficult code, to expect to find a chain of consistent decisions entirely free from anomalies. It is urged that an assignee of Mrs. O'Leary, that a tenant *pur autre vie*, could make a claim for disturbance, and therefore why not the representative of the tenant herself? It is answered by Mr. Ronan that, though it may appear anomalous to have a difference, still there is a real difference, as the assignee, and tenant *pur autre vie*, are both persons who have been tenants, and who are *there* after the determination of the tenancy, to make a claim for compensation in respect of a tenancy which they once held, and have now lost. In the case of Mrs. O'Leary, on her death, there was no one who had been tenant to make any claim. With her life her interest ceased—her tenancy was over. She had enjoyed her tenancy to the full limit of its duration, she had never been disturbed, and how can her personal representative claim compensation for disturbance? Who was disturbed? Not

the tenant, who died undisturbed; not her personal representative, who had no interest in the lands. It is said that the personal representative, although he took no interest in the farm, still took a right to make this claim; but the questions will always turn up, and must be met and answered, Who was disturbed, and what was the act of disturbance? If compensation for disturbance was payable in such a case, why should the personal representative, rather than a devisee, be entitled to claim it?

Roe v. *Cooney* (1) has been appealed to by the respondent. It is sufficient to say, without discussing it, that that case was decided on the 21st section of the Land Act of 1881, and may be explained and defended on the words—not very happily chosen—of that section, but cannot be applied with any effect to the ascertainment of the rights in dispute before us.

In my opinion the judgment of the Land Commission should be varied as to this claim for compensation for disturbance, and be otherwise affirmed, each party to bear his own costs of the appeal.

FITZ GIBBON, L.J.:—

I concur with the Lord Chancellor, upon the principle that, in construing a statute, we cannot deprive any person of property which would otherwise be his, or impose a liability upon him to which he would otherwise not be subject, unless we can find plain words which have that effect. In the case of a holding for the life of an occupying tenant, where the tenant has not been disturbed during his life—where the landlord has done no act to disturb him—I can find no words giving compensation for disturbance to a succeeding occupier, and in the absence of express legislation, we cannot penalize the landlord's re-entry upon his own property, nor give compensation to a person who is not and never was a tenant. Such a result cannot be attained either upon conjecture as to the policy of the act, or by implication from provisions made in other cases.

The decision appealed from rests on the supposed analogy of the law as to compensation for improvements.

(1) 14 L. R. Ir. 243.

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Bewley, J., says:—"The interest which Mrs. O'Leary had in the improvements on her holding . . . clearly became vested in Mr. F. H. O'Donovan, her personal representative, even though the tenancy determined by her death. Similar considerations . . . apply to the claim for disturbance. This is a right arising from the mere possession of the holding, irrespective of the term or estate of the tenant in the lands, and . . . it is an interest which . . . also passes to the personal representative of the deceased tenant." I cannot agree in this. The foundation of the claim to compensation for improvements is not, in my opinion, similar to that of the compensation for disturbance. The latter does not arise from the mere possession of the holding; it arises, in the words of the Act of 1870, section 3, from the fact that "*the tenant*" "is disturbed in his holding by *the act of the landlord*." Before it arises, you must have a "tenant," and an "act of the landlord" which disturbs him "in his holding." This compensation, under the Act of 1870, was limited to "*the loss* which the Court shall find to be sustained *by the tenant*, by reason of *quitting his holding*." These words are repealed by the Act of 1881, section 6, but that Act still limits the tenant's claim "to such compensation as the Court, in view of all the circumstances of the case, shall think just," within the prescribed scale. The tenant, and the subject-matter of the claim, remain the same, though the amount which may be awarded is extended. But just *compensation*, and not vindictive nor even exemplary damages, must still be awarded. In my opinion, it is still an essential condition to the right to compensation for disturbance that there shall be a "loss sustained by a tenant by reason of quitting his holding," and that his quitting shall be caused by an act of the landlord which disturbs him in his holding. It is of course obvious, as pointed out by Mr. Butt, that "disturbance" cannot be limited to disturbance of any legal right, but must mean disturbance of possession in fact. The most usual case where the claim arises is where the act of disturbance by the landlord terminates the tenancy, and puts an end to the tenant's occupation. But still the person disturbed must be a "tenant" within the meaning of the Act when his claim arises, and I cannot hold a person to be a tenant for the mere purpose of giving him compensation who is not, and never was, a tenant for any other purpose. A

tenant who is entitled as such to compensation if he is disturbed, may have ceased to be a tenant before he is actually turned out, or before the compensation is paid, but he must have been a tenant previously. I think this is made clear by the provision in section 70 :—"Where the tenancy of any person, *having been a tenant* under a tenancy which does not disentitle him to compensation under this Act is determined or expiring, *he* shall, notwithstanding such determination or expiration, be deemed to be a tenant until the compensation, *if any*, due to him under this Act has been paid or deposited, as in this Act provided." This clause is well interpreted by Mr. Butt, p. 39 :—"It is plainly intended to give facilities or protection to a person entitled to compensation under the provisions of the Act, not to confer a title to compensation when it does not otherwise exist." This clause, therefore, cannot help the present claimant, unless he can show that he is a "tenant" *aliunde*.

The next important question that arises on the judgment of Bewley, J., is whether, on the death of a tenant for his own life, the compensation for disturbance, if payable at all, passes to the personal representative of the deceased tenant. Mrs. O'Leary's tenancy was a freehold. As a matter of fact, she devised her freehold property to her sister for life, and it is an accidental circumstance that this devise lapsed.

If compensation for disturbance is payable to anybody when the landlord re-enters, is the personal representative to be preferred to a devisee, or to an heir-at-law, who remains in occupation? If the land is left derelict, or is occupied by a stranger to the deceased tenant, or if the personal representative makes no claim, or is not in occupation, is compensation payable at all? If anyone whomsoever manages, anyhow, to seize the vacant possession, the landlord cannot recover that possession without bringing an ejectment, which he is bound to serve only on those whom he finds in occupation, and is his liability to compensation to depend on a race for the possession, or on the relation which subsists between the deceased tenant and the winner in such a race? If the landlord himself gets in peaceably before anyone else, is that an act which disturbs a tenant? Unless these questions are to be answered in the affirmative no claim for disturbance exists, and if such a claim is admitted, I see no escape from the recognition of special occupancy,

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and even of general occupancy, as part of the law of compensation for disturbance, upon the expiration of a letting for an occupying tenant's own life. In short, I can find no principle which can be applied without absurdity or injustice, if the disturbance of an actual or past tenant be not the essential condition of the accruer of liability to pay compensation for disturbance to anybody or at all. Cases of difficulty may be suggested, such as that of an occupier *pur autre vie* or of an assignee, or of the death of an overholding tenant before actual disturbance. Without venturing to discuss such cases until they arise, it is enough to say that no case has yet been suggested which could not be tested by inquiring whether some person, by or through whom the claim was made, was not a tenant at the expiration of the tenancy, and remained on in occupation—*i. e. overheld*—for at least an appreciable period of time *after* his actual tenancy determined.

The application of this test at once brings out the vital distinction between the present case and *Roe* v. *Cooney* (1). *Roe* v. *Cooney* (1) was decided upon the meaning of the words "*at the expiration* of such existing leases" in the Act of 1881, sect. 21. In that case, Sir Edward Sullivan says, "*at* is not *on*; and if *at* gets its true grammatical meaning in the English language, there is no difficulty in holding that the lessee, though his lease terminated *eo instanti* that he died, was *at that moment* to be deemed a tenant from year to year." "The Act does not say that the man that is dead 'shall hold' after his death, but, in much more guarded language, that he is to be deemed, *at the moment of his death*, a tenant from year to year."

The principle of the decision is admirably put in Cherry and Wakely in the note to section 21, p. 278, "'*At* the expiration'" in that section "is not to be construed '*after* the expiration.'" It is obvious that the construction of the words "at the expiration" of existing leases in the Act of 1881, section 21, has no application whatsoever to the construction of the entirely different words "tenant who is disturbed in his holding by the act of the landlord" in the Act of 1870, section 3. No one was disturbed in this holding—no act was done by the landlord in this

(1) 14 L. R. Ir. 243.

case—until after the tenant had died. Mrs. O'Leary died on February 18, 1884. Possession was demanded in April, and the writ of ejectment was issued on August 13, 1894. There was then no tenant to be disturbed, and there was therefore, in my opinion, no person "entitled to compensation" for the lawful re-entry by the landlord into his own property, and no person then had any lawful claim whatever against that property in respect of the change of ownership consequent upon the tenant's death.

It is right that I should explain my view of the distinction between the nature and foundation of the claim to compensation for disturbance and that to compensation for improvements. I do not agree with Bewley, J., that the effect of the Act of 1870 was that the tenant "acquired *a specific interest* in the improvements entirely distinct from his term or estate in the lands"; but I do hold that any tenant who occupies a holding within the Act, and who executes improvements upon it, thereby acquires (subject to the statutory limitations) a right to claim compensation for those improvements "on quitting his holding." This quitting may be voluntary or involuntary; it may be due to the act of the tenant or to the act of the landlord, but, however it is brought about, it transfers to the landlord the holding increased in value by the improvements which the tenant has made upon the faith of his statutory right to be compensated for them whenever he quits them. This right is absolutely independent of any act of the landlord. The personal expenditure of the tenant upon what his landlord gets up from him gives to his personal estate, and therefore to his personal representative when the tenant himself is dead, the right to be recouped the amount or value of what the landlord has actually profited by the tenant's outlay of money or labour. The foundation of such a claim appears to me to be totally dissimilar in its nature from the foundation of a claim for compensation for disturbance; the words describing the events upon which the two claims arise are entirely different, and I cannot help feeling that the conclusion arrived at by the Land Commission was largely due to a specious analogy between two things which are essentially different in every important respect.

We have no jurisdiction to discuss the amount of compensation; but I think that an examination of the principle upon which the

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compensation for disturbance was assessed in this case will, to some extent, test the question whether there is any legal principle upon which it could have been awarded at all. Mrs. O'Leary was a lady of some means and position; she was tenant under a lease which expired by effluxion of time in 1883. Lord Kenmare then brought an ejectment to recover the possession. Mrs. O'Leary had a good defence, if she was entitled to be deemed a tenant from year to year under the Act of 1881, section 21, but not otherwise; she took defence; her defence was actually filed by a solicitor of experience in such cases. I am willing to concede that if she had persevered she might have succeeded in that defence. But Bewley, J., truly says, "Many questions that have since been decided by the Court of Appeal in reference to demesne land, residential holdings, and lettings for temporary convenience were then unsettled, and matters of doubt"; and Mrs. O'Leary "being an old lady without children, and desirous of remaining in the holding for the remainder of her life," signed the agreement of October 18, 1884, to continue to hold the lands as demesne lands only for her own life, at an increased rent of 5*s.* an acre. It is a strong thing to say that this agreement was entered into by her without any professional advice, for she was then actually defending the ejectment through a most competent solicitor. It is an even stronger thing to say that she was induced to sign it by Mr. Leonard, the landlord's under agent. She went to Killarney to ask Mr. Hussey, the head agent, for a settlement. She wrote more letters than one asking to be left in the holding for her life. Mr. Leonard, at her request, pressed her application upon Lord Kenmare the landlord, and he ultimately consented; she said she was thoroughly satisfied before the agreement was drawn up. On the evening after she signed it she told the present claimant "that she was after making a settlement"; and after that again, on September 23, 1884, she wrote a letter to Mr. Leonard, which was produced to the Land Commission, thanking him for what he had done on her behalf. Though the insertion of the words "as demesne lands" in the agreement cannot alter their character, this was not altogether a device to exclude the Land Acts, for the place had been so described in 1816, and it certainly was the intention of both parties to the agreement of 1884 that the right to

remain during her life only should be accepted as all that she was to get, and as a settlement of the ejectment then pending. It is not proved that she ever actually paid the additional rent, and up to 1888, at least, it is proved that she paid the original rent only; she never made any claim during her life to any rights under the Land Acts, and she occupied the holding under the agreement, and undisturbed, for nearly ten years until her death. Among the decisions of the Court of Appeal which were pronounced during that time are *M'Cutcheon* v. *Wilson* (1) and *Cloncurry* v. *Finnerty* (2) which go far to show that, if the purpose and circumstances of this agreement had been expressed upon the face of it, this letting would have been held to be made for the "temporary convenience" of the tenant. What, then, is the principle upon which the maximum amount of compensation which, under any circumstances, could be awarded against any landlord for the eviction of a tenant has been awarded by the Land Commission —not to Mrs. O'Leary, who kept her bargain and enjoyed the full benefit of it during her life—but to her executor who, after her death, offered the landlord a fine of £600 and a rent of £120 for a new letting, and to whom the holding was offered at the fine named by himself, if he would pay the same rent as before?

The judgments of Bewley, J., and Mr. Commissioner O'Brien, plainly state the principle upon which they concurred in awarding the maximum compensation for disturbance. They assumed that Mrs. O'Leary had lost a present tenancy from year to year, as distinguished from a tenancy for her own life only. This is tantamount to a decision that the agreement to hold for her own life was null and void, though the validity of it was not only recognised by the judgments, but is the foundation of the whole proceeding. Compensation for the loss of a holding for a life only cannot be measured by the value of a present tenancy from year to year, which could not be disturbed. The principle, therefore, upon which this maximum compensation was awarded is self-contradictory, and inconsistent with the facts of the case. This being so, I may ask, upon what legal principle the compensation for the expiration of a tenancy for an occupier's own life, and the conse-

(1) Unreported. Cited in *Driscoll* v. *Riordan*, 16 L. R. Ir. 235. (2) Unreported.

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quent resumption of the holding by the landlord can be assessed at all? I am unable to formulate any principle which would, under such circumstances, give the personal representative of the deceased occupier any compensation beyond nominal damages, for the passing of the possession to the landlord, and this consideration appears to me to strengthen the conclusion that the Act does not apply to such a case.

It is interesting, upon the distinction between disturbance and improvements, to observe that under the English Agricultural Holdings Act (46 & 47 Vict. cap. 61), compensation for improvements is given to the tenant "on quitting his holding *at the determination of a tenancy*"—the very words discussed in *Roe* v. *Cooney* (1)—and that the English Court of Appeal, in *Gough* v. *Gough* (2), has held that it would be repugnant to natural justice to confine the meaning of "landlord" in that Act to the landlord personally, to the exclusion of the personal representatives of the deceased landlord. That case would have been important as an authority upon the right of the present claimant to the compensation for improvements if Mr. Ronan had not, wisely as well as justly, admitted that claim. It has no application to the grounds of my judgment disallowing the claim for disturbance; on the contrary, it adds point to the distinction between the two classes of compensation.

Barry, L.J.:—

In this case I mean simply to express my concurrence in the proposition that the claimant here is not in a position, on the true construction of the Act of Parliament, to maintain his claim for compensation for disturbance. The words of the Act are very simple:—When the *tenant* of any holding, etc., is *disturbed in his holding by the act of the landlord* he shall be entitled to such compensation. First, then, the person to receive the compensation must be a tenant. The claimant here is not, and never was, tenant of the holding in question. Secondly, the tenant who is to be compensated must have been "disturbed in his holding by the act of the landlord." It is impossible, in accordance with the ordinary meaning of our language, to apply that phrase to the position of

(1) 14 L. R. Ir. 243. (2) [1891] 2 Q. B. 670.

the claimant here. On this plain ground I rest my judgment, confining myself to the single proposition that O'Donovan is not a person entitled to compensation for disturbance within the construction of this Act of Parliament.

WALKER, L.J. :—

I have nothing to add on the preliminary questions as to demesne lands and temporary convenience, but I am unable to concur with my colleagues on the claim for disturbance. Inasmuch as my dissent cannot affect the result in this or any other case, as our decision is final, I should stop with that mere expression of dissent, were it not that I agree with the Judges in the Court below, and therefore it will be more proper, out of my respect for them, to give my reasons.

The claim of the executor here was for (1) compensation for improvements, (2) compensation for disturbance.

Now, in the first place, I may make the general observation that in dealing with this Act of 1870, and the Act of 1881, one must be prepared for the use of terms in a sense different from their known legal meaning. Rights are expressly conferred on persons who, for the purpose of receiving those rights, are "deemed to be" what they are not.

In this particular case of improvements the important words are, "any tenant of a holding may, on quitting his holding, claim compensation, to be paid by the landlord, under this Act, in respect of all improvements on his holding made by him or his predecessors in title."

In certain species of lettings, of which the present is not one, the right to compensation is controlled or modified. The holding, therefore, is one in respect of which, both by its character and tenure, full compensation for improvements is claimable; but there remains the description of the "person" who can claim, and the "time" at which he can claim.

In the first place it is the "tenant" who is to claim. That does not mean only the "tenant," as defined by the Act of 1860, viz. the person who is tenant by title, whether original or derivative. It necessarily includes a person whose title has altogether ceased; *e.g.* if the claimant were the assignee of Ellen O'Leary,

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claiming after her death, and after and consequent on his own eviction, or ceasing, in fact, to occupy, he would be tenant *pro hac vice*, and by virtue of the definition in section 70, as he had been tenant for life by lawful assignment, and his tenancy had expired by the dropping of the life, the *status* of a tenant would be attributed to him till the compensation, if any, due to him had been first claimed, and secondly paid or deposited.

Take next the case of Ellen O'Leary herself. She fulfils all the conditions as regards tenure, but she must be "tenant" or her executor, or administrator, *pro hac vice* must be "tenant."

I do not think there is a vested right of property in the improvements. The Act confers a title to claim in certain events which is different from a right of property. The title is an incident of the tenancy and passes with each transmission of it, but has no existence in fact till "quitting." A claim for compensation cannot co-exist with a continuance in possession, *e.g.* if the executor of Ellen O'Leary had been allowed to continue in possession, there could not be a claim for improvements, no more than if her assignee had been so allowed to remain, though in each case there would be a new tenancy.

The words "quitting the holding" must I think mean "quitting in fact." They cannot mean "losing title to it" by, for instance, the dropping of a life, though quitting in fact may follow as a consequence. Section 2 of the Act of 1870 bears out this view.

In this case Ellen O'Leary and her tenancy expired together. The words "determined or expiring" in the 70th section include by the dropping of her own life, and the words "deemed to be a tenant" must I think include the power of transmitting to her executor (and every executor is an assignee) the right to claim compensation, when and if possession is taken up in fact, either by the act of the executor or *in invitum*.

In other words, once you have a subject-matter to which the right is attached, the right to claim and receive payment will not be affected by any cesser of the tenant's title, and to carry out this object there will be an imputed prolongation of the tenancy beginning with the moment of cesser of title and covering the quitting in fact and claim and payment.

The claim for improvements was on this appeal not disputed, but the point cannot be left so because it has a vital bearing on the claim for disturbance, and I think apart from concession it is well founded in law.

Next take the claim for "disturbance." It has been conceded that if the claimant has any right to get compensation under this head, we are not to reconsider the amount awarded, which relieves me from considering the principle on which it has been assessed.

The third section as it has been amended runs, "where the tenant of any holding held by him under a tenancy created after the passing of this Act is disturbed in his holding by the act of the landlord he shall be entitled to such compensation as the Court in view of all the circumstances of the case shall think just"—subject to the rule. The only exception is where the tenant has had a possession of not less than thirty-one years under a lease for that term. It does include a tenancy for a life. "Disturbed" does not mean unlawfully disturbed. What the section deals with is the case of a man, without title at the time, put out by the assertion of a lawful title. To fit the object, it must mean "where after the determination of a tenancy held under a less than thirty-one years' lease the tenant who had been such, is put out of the possession by the landlord in pursuance of his legal rights." The breaking up of a home is as much a loss in the case of a tenant who held for his own life as for the life of another or for a thirty years' term.

The statute I think creates a good will to have the possession retained for thirty-one years or its loss compensated for. It was not argued that compensation for disturbance would not be given if the claimant were the assignee of Ellen O'Leary. Is the test to be whether the past tenant shall be herself living when the landlord effects the removal and takes the possession? Suppose she held under a twenty-one years' lease and died intestate, after the term expired, but before the landlord brought ejectment or executed an *habere*. I do not see why the section should be limited to the case of a tenant who is such at the expiration of the term, and lives on till the act of removal takes place. "Disturbance" is payment for the loss of a possession which sprung up under, and is attributable to, a tenancy under the Act and which is protected *pro tanto*.

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The argument that a man cannot be disturbed, because he is not there, seems to me to confound the act of disturbance with the cesser of title—the taking up of possession with the right to take it up—a right which of course strikes one as obvious beyond dispute when the lessee for life dies.

We must, however, not only have the object in the statute but sufficient words to carry it out. If we were dealing with the case of Ellen O'Leary's assignee, what would give him the right to claim for disturbance? The 70th section. [His Lordship read the definition of "tenant" in the section.] "The compensation, if any, due to him under this Act," *i.e.* all kinds of compensation, including compensation for disturbance. The section cannot be confined to the case of prolongation from the period of claim up to payment, because *ex hypothesi* he cannot claim till after the death and after he has been disturbed, so that the projecting of the imputed tenancy begins with the death of the *cestui que vie*, and ends with the payment of compensation, unless he is to be altogether excluded.

Take the case next of a tenant holding for his own life. He is a tenant for life, and one whose tenancy does not disentitle him to compensation, therefore he is *prima facie* entitled to the benefit of the imputed tenancy portion of the definition. Further, his tenancy is determined. It is then contingent whether the landlord will, or will not, take up possession. It seems to me that at the very moment of his death the imputed tenancy takes, for the purpose of the the section, the place of the real one, and that the right to protect the possession by claim is transmitted to the personal representative, if the possession is taken up consequent on the loss of title which happens by death. If the lease of the 18th October, 1884, had been made on the 18th August, 1881, O'Donovan, as executor, would, under sect. 21, have been deemed to be a present tenant under *Roe* v. *Cooney* (1). It was there held in the Court below that a lessee holding for his own life was excluded from the benefit conferred by sect. 21, because at his death there was no tenant to take on the tenancy, or answer for the rent. (See judgment of Morris, C.J., at p. 79.) The Court of Appeal

(1) 14 L. R. Ir. 243

reversed that decision on the ground of the general policy of the Act—putting the case of the assignee of the lessee, and holding that the expiration of the lease and transmutation into a present tenancy took effect simultaneously, and not in sequence. May it not be said, then, here that at the moment of her death the imputed tenancy took the place of the expiring one under the same words, "shall be deemed"?

Several cases were put by the counsel for the appellant. It was said the landlord may elect not to disturb, and what is he to do? But if he does, he creates a new tenancy, whether it takes place under sect. 5 of the Act of 1860 or otherwise, and he creates it with the persons whom he allows to hold on, and necessarily under a new contract. Then it was said that if the lessee dies intestate, the landlord has no one to look to or to answer for his rent. That was the argument which affected the Court below in *Roe* v. *Cooney* (1), and it would equally apply to the case where a tenant for a term certain, or the assignee of Ellen O'Leary, died after the expiration of the term, and before any act of disturbance.

Upon the whole, I think that, as in *Roe* v. *Cooney* (1), this Court, in order to carry out the policy of the Act, put the personal representative in the place of the dead tenant, and deemed him to fill the character of one, so it should in this case; and therefore I do not see my way to differ from the decision of the Land Commission.

Solicitors for the claimant: *Wolfe & Fitzmaurice.*
Solicitor for the respondent: *Downes.*

G. Y. D.

(1) 14 L. R. Ir. 243.

Ex. Div. 1896. Jan. 20, 21, 28. Feb. 28.

In the Matter of THE GENERAL VALUATION ACT, 1852, and of the ACTS RELATING TO THE VALUATION OF RATEABLE PROPERTY IN IRELAND; and in the Matter of THE DE LA SALLE TRAINING COLLEGE. THE GUARDIANS OF THE POOR OF THE WATERFORD UNION, Appellants; J. G. BARTON, Commissioner of Valuation, and THE BROTHERS OF THE DE LA SALLE TRAINING COLLEGE (BROTHER THOMAS, Superior), Respondents.

Hereditaments used exclusively for charitable or public purposes—Rating—Training College—Paying pupils—Rules of Commissioners of National Education—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2.

A parcel of land with buildings thereon was in the occupation of certain members of a Roman Catholic religious community, bound by a vow of poverty, and obliged by their rules to pay into the coffers of the community all proceeds derived from teaching after feeding and clothing themselves, which proceeds were applied for the purposes of education. The buildings consisted of a college, built at the expense of the community out of their own funds, for the training of young persons to become National teachers. Of these a certain number were admitted, subject to the sanction of the Commissioners of National Education, and supported and educated wholly out of a grant of £50 for each person made by the Government, and sums received from the Government as rewards for proficiency. Besides these, certain pupils were admitted at a yearly fee of £50 each, for the purpose of being prepared to receive the sanction of the Commissioners of National Education, and thereby to come upon the public endowment. These yearly fees were applied for their maintenance, and any surplus was carried to the credit of the Commissioners, but there was no obligation on the part of the community to do so:—

Held, that, having regard to the admission of the pupils paying such yearly fees, the College was not used exclusively for charitable or public purposes, and was not altogether of a public nature, and was therefore not exempt from rating.

Case stated for the opinion of the Court by Judge FitzGerald, County Court Judge, and Chairman of Quarter Sessions of the County of Waterford, as follows:—

This case came before the Court of Quarter Sessions in Waterford on the 6th June, 1895, on appeal from the decision of the Commissioner of Valuation, dated 3rd April, 1895, whereby he distinguished in the valuation lists for the city of Waterford certain tenements consisting of Refectory Room, Newtown House, College and land, in the occupation of the De La Salle Brothers, and entered the same in the list of hereditaments exempt from assessment. The appeal was brought by the Guardians of the Waterford Union who duly served on the Brothers of the De La Salle Training College the notice of appeal set out in the schedule hereto. The occupier named was Thomas B. Kane, one of the Brethren of the De La Salle community and principal of the College.

The land which consisted of 4A. 1R. 25P. statute measure, was formerly rated, and, in making out the valuation lists this year, the Commissioner of Valuation at first proposed to place a valuation of £18 on the land, £10 on the Refectory, £35 on Newtown House, and £450 on the new Training College.

The following facts were proved before me:—The De La Salle community has its head quarters in France with ramifications through Europe and America.

The brethren are bound by a vow of poverty, and are obliged by their rules to pay into the coffers of the community all the proceeds derived from teaching after they have fed and clothed themselves, which proceeds are applied for the purposes of education. The individual members derive no emolument from teaching.

The Training College in Waterford was built in the year 1892 out of the funds of the community at a cost of £25,000. Prior to that date there had been no Training College belonging to the community, but there had been a small house belonging to them which was valued at £63, of which £18 represented land and £45 represented buildings. In connection with the Training College the community had acquired a holding of Bishop's Court close to Waterford which they work as a model farm, out of which a profit is made; but this profit goes to the credit of the National Board of Education and is not received by the community. It will be seen by reference to the Government rules under which

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this establishment obtains its grant that a farm must be kept. The rules dealing with such grants were put in evidence (1) and are to be read as part of this case, as are also the printed rules and prospectus of the Training College. Students (of whom there are 118) are admitted to the College subject to the sanction of the

(1) The following of the National Board Rules were referred to:—

147F. (*d*) The Commissioners also recognise in the Marlborough-street College an Extern Class, which is composed of a limited number of duly qualified young persons who wish to become National Teachers. The Commissioners do not provide board and lodging for such externs, but they are permitted to attend, without any charge, the Model and Practising Schools and the Lectures of the Professors, and at the end of the Training course they are examined for classification as Teachers, according to their merits and qualifications, and after two years probation as Teachers of Public Elementary Schools are entitled to Training Diplomas on the prescribed conditions.

149F. Grants are made to each College (Marlborough-street included), as follows:—

(*a*) A fixed grant of £50 for males in training for one year; and £100 for those in training for two years.

(*b*) A fixed grant of £35 for females in training for one year; and £70 for those in training for two years.

(*c*) In addition, a Diploma Bonus of £10 for males for the one year of training; and £20 for two years of training; on the award of the Diploma for training after a probationary service of two years in the actual work of teaching.

(*d*) A Diploma Bonus of £7 for females for the one year of training; and £14 for two years of training; on the award of the Diploma for training after a probationary service of two years in the actual work of teaching.

(*e*) In a College consisting of male and female students, with a substantially common staff of Professors and other officers, the grant may be calculated at £50 multiplied by the number of male students, and £35 by the number of female students; the rule as to the limit of the grants being satisfied, whether the male students cost less than £50 and the female students more than £35, within the total limit, or *vice versa*.

(*g*) If the new grants yield a surplus upon the certified expenditure, such surplus may be applied to scholarships, prizes, the purchase of apparatus and educational appliances, or any other suitable purpose approved by the Commissioners of National Education.

(*i*) The new system of grants embodied in these regulations takes effect from the 1st September, 1890; and the Diploma Bonus will apply to all cases where the Diplomas were issued on or after the 1st September, 1890.

Commissioners of National Education, and pay no fees, but are supported and educated wholly out of the Government grant of £50 each per annum, and certain additional sums received from the Government in the nature of rewards for proficiency.

A few paying pupils called 'extern students' are also admitted, at a yearly fee of £50 each, for the purpose of being prepared to receive the sanction of the National Board and thereby to come upon the public endowment. Their yearly fees are applied for their maintenance, and if there should be any surplus it is carried to the credit of the National Board. The same rules are applied by the National Board to this Training College as are applied to the Marlborough-street Schools in Dublin and to other Training Colleges subject to their jurisdiction; but the buildings of the Marlborough-street College are stated to be Government property, and the Training College there is not in the hands of a religious community.

The accounts for the year ending August 31st, 1894, were put in evidence, whence it appeared that the whole of the funds for carrying on the College, amounting to £3080, was Government money supplied by an annual vote in Parliament with the exception of £500 from ten extern pupils, £44 the price of certain books sold, and £46 17*s.* 7*d.* profit derived from the farm, the balance of all which items is carried to the credit of the National Board. These accounts are to be taken as part of this case. With reference to an item (£277 10*s.* 1*d.*) put down as the payment of capital borrowed, it was proved that this was money borrowed by the community from private sources in the first year of the existence of the College, but repaid in the second year out of the receipts for that year. These accounts are submitted to a Government Auditor and without the consent of the National Board the receipts could not be so applied. The profit derived from the farm is also carried to the credit of the National Board.

The professors, of whom there are five or six, are all members of the community and receive salaries from the Government as in the other Training Colleges (amounting in the aggregate for last year to £1171), but under their rules they can derive no personal emolument from them.

Some correspondence between the authorities of the College

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and the Commissioner of Valuation was put in, from which it appeared that the Commissioner had fixed the valuation of the new College at £450 but had made no alteration in the value of the land, which remained at £18. On the 12th May, 1891, the Board of National Education made a minute accepting the new College as a Training College, and allowing it a grant from the 1st December, 1891. This minute was put in evidence, and is to be taken as incorporated with this case.

After the correspondence referred to a notice of appeal was lodged by the De La Salle Brethren with the Valuation office on the 27th February, 1895, which resulted in a correspondence of which only one letter need be referred to: that of the 16th March, 1895, from the solicitor of the College to the Commissioner of Valuation, in which the grounds upon which exemption from assessment was claimed is set forth. The counsel for the Commissioner of Valuation stated that it was on the ground that the College was used for public purposes that it was ultimately exempted by the Commissioner from assessment. It was contended by counsel for the College that it was entitled to exemption either as a building used exclusively for charitable purposes, or as a building 'used for public purposes,' within the meaning of the 1 & 2 Vict. c. 56, s. 63, and the 17 Vict. c. 8, s. 2, while counsel for the Commissioner of Valuation relied only on the latter ground.

It was contended for the appellants that the case did not come within either exemption. It was proved that the other Training Colleges such as Marlborough-street, for males, and Baggot-street, for females, were and always had been exempt from assessment on the ground that they were buildings used for the public service or for public purposes. The purpose for which this as well as the other Training Colleges exists is to apply the Government grant to the education of teachers for the National system.

I was of opinion that the College, though worked by a religious community, was an institution carried on solely by Government money, under Government control, and I could see no distinction between it and the other Training Colleges of which Baggot-street, for example, is also worked by a religious community. I therefore

held that the College was 'an hereditament used for public purposes,' and so advised the only magistrate who sat with me, and we rejected the appeal with costs.

The questions for the opinion of the Court are :—

1. Is the College, 'an hereditament used for public purposes' within the meaning of 1 & 2 Vict. c. 56, s. 63?

2. Is the College 'an hereditament of a public nature occupied for the public service' within the meaning of the 17 Vict. c. 8, s. 2?

3. Is the College 'a building used exclusively for charitable purposes' within the meaning of 1 & 2 Vict. c. 56, s. 63?

4. Is the College an hereditament 'used for charitable purposes' within the meaning of 17 Vict. c. 8, s. 2?

If the Court should be of opinion that all these questions must be answered in the negative, the decision of the Court of Quarter Sessions should be reversed, otherwise it should be affirmed.

Battersby (with him, *O'Connor*, *Q. C.*) for the Waterford Guardians :—

The statute 1 & 2 Vict. c. 56, s. 63, provides that "no building . . . . used exclusively for charitable purposes . . . or dedicated to or used for public purposes, shall be rateable, except where any private profit or use shall be directly derived therefrom, in which case the person deriving such profit or use shall be liable to be rated." By 15 & 16 Vict. c. 63, s. 15, the Commissioner of Valuation shall in his lists distinguish all houses of a public nature or used for charitable purposes which shall be exempted from assessment. (See also 17 & 18 Vict. c. 8, s. 2.) Where fees are charged and profit made the institution is not exclusively charitable. In this case the extern students produce a profit of £500 a-year, therefore the institution is not exclusively charitable: *Rex* v. *St. Giles, York* (1); *Reg.* v. *Sterry* (2); *Reg.* v. *Baptist Missionary Society* (3); *The Trustees of Magee College* v. *The Commissioner of Valuation* (4); *Reg.* v. *Pocock* (5). A "private profit or use" is derived by the managers of the institution: see *Guardians*

(1) 3 B. & Ad. 573.
(2) 12 A. & E. 84.
(3) 10 Q. B. 884.
(4) Ir. R. 4 C. L. 438.
(5) 8 Q. B. 729.

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of Bristol v. *Wait* (1). The purpose of the institution cannot be deemed to be a "public purpose," because in order to constitute a "public purpose" the institution must be used and occupied for the public service, and each member of the public must have an interest in it: *Reg.* v. *Harrogate* (2); *Reg.* v. *Badcock* (3); *Guardians of Londonderry Union* v. *Londonderry Bridge Commissioners* (4); *Mayor of Limerick* v. *Commissioner of Valuation* (5). The purpose is clearly sectarian: *Sisters of Mercy* v. *Water Commissioners, Belfast* (6). Even a residence for National teachers is rateable: *Heron* v. *Monaghen* (7). The occupation must be exclusively of a public character: *Reg.* v. *Harrogate* (2); and the fact of a losing occupation does not affect the question of the liability to rating: *Guardians of Bristol* v. *Wait* (1). Besides the pupils in such an institution are trained merely for the purpose of earning their own livelihood, and not for the public service. The fact of there being a Government grant in aid of these institutions does not necessarily bring them within the scope of public purposes and exempt them from rating: *Rex* v. *Hurdis* (8) and *Rex* v. *Terrott* (9). Neither the professors nor the students are civil servants, nor Crown officials; neither are they under the control of the Government, and a "public purpose" should be one connected with the Government: *Representative Church Body* v. *Commissioner of Valuation* (10).

[Counsel also cited *Mersey Docks Trustees* v. *Cameron* (11); *Rex* v. *Weaver Navigation* (12); *Rex* v. *St. Luke's Hospital* (13); *Rex* v. *St. Bartholemew-the-less* (14); *Rex* v. *Commissioners of Navigation of Salter's Load Sluice* (15); and *Rex* v. *Inhabitants of Liverpool* (16).]

J. F. V. Fitzgerald (with him, *Ross*, Q.C.), for the Commissioner of Valuation:—

The institution is one for public purposes, and the particular

(1) 5 A. & E. 1.
(2) 15 Q. B. 1012.
(3) 6 Q. B. 787.
(4) Ir. R. 2 C. L. 577.
(5) Ir. R. 6 C. L. 420.
(6) 4 Ir. Jur. (N. S.) 270.
(7) 22 L. R. Ir. 532.
(8) 3 T. R. 497.
(9) 3 East, 506.
(10) Ir. R 6 C. L. 561.
(11) 11 H. L. Cas. 443.
(12) 7 B. & C. 70 n.
(13) 2 Burr. 1053.
(14) 4 Burr. 2435.
(15) 4 T. R. 730.
(16) 7 B. & C. 61.

creed of the students educated can make no difference (see *per* Lord Blackburn in *Coomber* v. *Justices of Berks* (1)). The *Londonderry Bridge Commissioners Case* (2) shows that, where there is a statutory dedication of the surplus receipts of a public undertaking to a public purpose, the undertaking is one used entirely for public purposes. The same principle applies where there is a contract with a public department to apply the surplus profits of a public institution to a public benefit. This institution is supported entirely by Government grant except two small items which the appellants rely on, namely (1) the surplus profits of the farm, and (2) a possible surplus from the fees of the extern students, though the £50 fee paid by an extern student is only designed to cover expenses and is in fact the same amount per head as given by the Government. As regards the first, by the National Board Rules a farm must be kept for the purposes of education, and the surplus receipts are applied in relief of the Government grant. The surplus fees of the extern students are also so applied. This application of all the surplus receipts should therefore be regarded as made with the knowledge of and by arrangement with the National Board, and so long as such application in fact continues the use of the institution is one wholly for public purposes. The status of extern students is recognised by the National Board Rules (see Rule 147F (*d*), N. B. Rules). The facts of the case make it distinguishable from the authorities cited by the appellants.

Cherry (with him *Samuels*, *Q. C.*), for the De La Salle Community:—

This is an educational charity. The surplus profits being in fact devoted to charitable purposes makes the institution exclusively charitable within the meaning of the Acts. Admitting for the sake of argument that there was a surplus from extern students which might possibly be applied for other purposes, yet compared with the income as a whole the sum would be trifling, and the doctrine *de minimis non curat lex* would apply.

[Counsel cited *The Queen* v. *Stewart* (3) and *Nicholson* v. *The Holborn Union* (4).]

Cur adv. vult.

(1) 9 App. Cas. at p. 71.
(2) I. R. 2 C. L. 577.
(3) 8 E. & B. 360.
(4) 18 Q. B. D. 161.

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PALLES, C. B.:—

The question upon this special case, which was stated by the Court of Quarter Sessions of the city of Waterford, is whether a Training College, recognised by the Commissioners of National Education under their Rules as a "training college under local management," was, having regard to the circumstances stated in the special case, exempt from taxation under the 17 Vict. c. 8, sect. 2. The learned Chairman of Waterford was of opinion that it was exempt.

The arguments upon which the appellants relied may be divided into two classes: first, those which were directed to show that under no circumstances could such a college be within the section I have mentioned; and, secondly, those which were based upon the special circumstances applicable to the particular case before us.

After careful consideration of the arguments, I have arrived at the conclusion that such a training college, if used exclusively for the gratuitous education of the classes of students contemplated by the Rules of the National Board under which they are recognised, viz. (1) "Queen's scholars," and (2) such day pupils as are described in No. 147F (*d*) (1) of the Rules, and therein called extern pupils, would be "used exclusively for charitable purposes," within the meaning of 17 Vict. c. 8, sect. 2, as controlled by 15 & 16 Vict. c. 63, sect. 16, and would therefore be exempt from assessment for poor rate, grand jury, and county rates. But I am further of opinion that the fact that, in this particular case, the pupils who are maintained and educated in the college include ten students for each of whom a payment of £50 a-year is required from, and is made by, his parents or friends, takes this college, as now used, out of the class within the section I have referred to; and that therefore it is not now exempt from taxation.

I proceed to state my reasons for these two conclusions. First, I hold that the word "charitable," as used in the Act 17 Vict. c. 8, s. 2, is to be read in the sense which the same word had received where it occurs in 10 Car. 1, sess. 3, c. 1 (Irish), which

(1) See footnote, *ante*, p. 540.

substantially corresponds with that of the same word in 43 Eliz. c. 4 (English). It is unnecessary to discuss at length the many cases in which this construction of the word was adopted in several statutes in which nothing appeared to restrict its general meaning. The most material of them were referred to, and commented upon at length, in the opinions of the Law Lords in *The Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1). It is sufficient to refer to the emphatic words of Lord Macnaghten in that case:—"Of all words in the English language bearing a popular as well as a legal signification I am not sure that there is one which more unmistakeably has a technical meaning in the strictest sense of the term, that is a meaning clear and distinct, peculiar to the law as understood and administered in this country, and not depending on or coterminous with the popular or vulgar use of the word." He adds—"In Ireland, though neither the statute of Elizabeth, nor the so-called statute of mortmain extended to that country, the legal and technical meaning of the word 'charity' is precisely the same as it is in England."

Further, I cannot entertain any doubt that the purpose of the Legislature, in providing money for the training in the art of teaching, at the sole expense of the State, of those who are to be the future teachers in the National and other elementary Governmental schools of the country, is a "charitable purpose." The Government scheme for the application to the charitable purpose of the money by Parliament provided contemplated its expenditure in training colleges in pursuance of the Rules of the National Board; and I think it follows that where the *only* use to which the occupation of such a college is applied is the carrying out therein of this charitable purpose in the mode prescribed by these Rules, and under arrangements, consistently with which profit cannot result to the occupier as such, such occupation must be deemed to be *exclusively* for such charitable purpose; and that the college, whilst so used, would, under the above-mentioned section, be exempt from assessment for poor rate, grand jury, and county rates.

(1) [1891] App. Cas. 531.

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Upon the other hand, if this use be one only of several to which the college is applied, or if the circumstances are such that a private profit may result to the occupier as such, then the case cannot be said to be within the section, as one of the purposes to which the occupation of the premises was applied would be that of making money, which is inconsistent with their exclusive use for charitable purposes.

Thus, as we intimated at an early stage of the argument, the only real question in the case is whether the college is used *exclusively* for the charitable purposes I have indicated. The grounds relied upon by the appellants, in support of their contention that they were used for other purposes, were three. The first consisted of criticisms upon the words of the Rules of the National Board, under which it was argued that it was possible that the local managers might make a profit. The second was founded upon the accounts of the college, as audited and approved of by the National Board, and upon the Rules of the Board, which, it was said, showed that a private profit might be, and in fact had been, derived by the managers from the Government grant; and the third was the admission of the ten students who, during the argument, have been called the "extern" students, each of whom pays a pension of £50 a year.

As to the first objection, my opinion is that the criticisms upon the Rules fail to show the result contended for. "Grants," which is the general expression, and governs every sum paid, "are made to each college, Marlborough-street included." Thus the "grant" is "to the college," and not to any particular individual; and such a grant in itself constitutes a charitable trust of the money so granted.

Next, it was argued that the "diploma bonus" was not within the "new grants" in paragraph (*g*). Upon the construction of the Rule I cannot agree in that argument. I hold that Rule 149F (1) divides "grants," which is the general expression with which the Rule commences, into two classes, viz. "fixed grants" and "diploma bonuses;" that the "fixed grant" alone is the subject of paragraph (*e*); and that paragraph (*g*), which

(1) See footnote, *ante*, p. 540.

uses the words "new grants," includes both the latter and "diploma bonuses." It follows from the above that the argument that any portion of the Government grant can be applied to the private profit of the occupier as such, fails. The entire surplus, after the certified expenditure, is bound by the purposes mentioned in 149F (*g*), which are plainly charitable.

As to so much of the second objection as relies upon the application of the grant, as shown by the audited accounts of the college, I have in the first instance to state that if the effect of the Rules, and the consent of the managers to accept aid under those Rules upon the conditions contained in them, in law impose, as in my opinion they do, a charitable trust upon all sums received from the Government, it would not necessarily follow, even were sums allowed in the accounts which ought not in strictness to have been so allowed, that the use of the hereditament would, merely by reason thereof, cease to be charitable. It is not our function to audit these accounts; and if there be, which I by no means say there is, error in them, the remedy for such error is not in this Court. For this reason I do not propose to go *seriatim* through the various items referred to by Mr. O'Connor in his reply; and especially I do not desire to express any opinion upon the sum of £277 10*s*. 1*d*., for which credit is taken as "repayment of capital borrowed," the facts in relation to which are not very clearly before us.

There is however one large item to which it is necessary to refer, as it is authorised by the Rules, and, if it involves the making of profit by the occupier as such, the use of the college, although exclusively for the purposes contemplated by those Rules, would not be charitable. The item I refer to is that of £1171, which is charged for salaries to the professors.

As to this item the case states: "The professors, of whom there are five or six, are all members of the Community, and receive salaries from the Government as in the other training colleges, amounting in the aggregate for last year to £1171." It is also found that the members of the Community, including these professors, "are bound by a vow of poverty, and are obliged by their rules to pay into the coffers of the Community all the proceeds derived from teaching, after they have fed and clothed themselves, which pro-

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ceeds are applied for the purposes of education. The individual members derive no emolument from teaching."

I do not attach any importance to the finding that the proceeds are applied for the purposes of education. It may or may not be gratuitous education; and the application of the surplus to such education may or may not be binding or enforceable. This purpose therefore may or may not be a charitable purpose.

Neither is it shown that the general purposes of the Community or Society are charitable; and indeed there would appear to be reason for the conclusion that the Community itself is within section 28 of the Roman Catholic Emancipation Act (10 Geo. 4, c. 7), and is therefore illegal.

But I deal with the professors, not as members of a community—which I do not recognise—but as individuals. Their vow of poverty has in law no binding force; and they are free to dispose of their earnings as they wish. Assuming the use of these hereditaments to be exclusively for the purpose of such a training college as is contemplated by the Rules of the National Board, I cannot see how the character of that use can be affected by reason of a particular professor, or of all the professors, being members of a Community, instead of being extern teachers. Again, it is now shown that the professors are, in fact, the occupiers, and certainly the payments made to them were not so made because they were occupiers, but because they were teachers. Such payments cannot be treated as profit to the occupier *as such*. It has not been suggested that there was any extravagance in the amount allowed to them. Had there been any such suggestion, the answer to it would have been that the amount of each salary is subject to the control of the National Board.

I have said so much for two reasons: first, that there may be no question as to the ground of my decision, which is based solely upon the existence in the college of the ten pupils, each of whom pays £50 a-year; and, secondly, because I find a difficulty in holding that a particular subject-matter is outside a class, without having first a clear conception of the essential characteristics of the class.

This reduces the question for decision to the effect of the reception of the ten pay-pupils.

The purposes for which the college was used were two :—1, the gratuitous education and maintenance of the Queen's scholars, who were educated in accordance with the Rules of the National Board; 2, the non-gratuitous education and maintenance of another class of pupils who, although they were within the words of Rule 147F (*d*) "young persons who wish to become National teachers," are excluded from that Rule as "board and lodging" is provided for them. Each of these pupils pays £50 a-year. Now, although the first purpose be, as I hold it is, a charitable one within the section in question, yet if the second purpose be not charitable within that section, it is obvious that the college was not used exclusively for charitable purposes.

Thus the question is whether the second purpose is charitable. It is of course admitted that, were there nothing special in the case, it would be impossible to contend that the education and maintenance in a college of a student in consideration of £50 a-year would be a charitable purpose. The decisions in *The Queen* v. *Sterry* (1), and in the *Trustees of Magee College* v. *Commissioners of Valuation* (2) go far beyond anything which it is necessary that we should decide in the present case. The question in the first of those cases was a claim of exemption from poor rate by an institution established by voluntary subscriptions for maintaining and educating the poor children of the Society of Friends. There had been large voluntary contributions which increased the funds of the institution to £30,000, which was invested in stock and lands for the purposes of the institution. The children were nominated for admission by a committee, but no child was eligible if its parents were able to defray the expense of its education elsewhere. The average expense of maintaining and educating each child was upwards of £20 per annum. The parents and friends of each child, if of ability, paid the sum of £12 per annum, but in a great number of cases, in consequence of their inability to raise this amount, it was collected from friends, or by contributions from meetings where they resided; and no child was

(1) 12 A. & E. 84. (2) Ir. R. 4 C. L. 438.

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admitted on the establishment without an annual contributio £12. The difference between the actual expenditure in respec the maintenance and education of the children, and the sums th paid by the parents or friends, was made up from the annual income derived from the interest of the stock and the rents of the landed property of the institution, and from constant annual contributions; and, if these were insufficient, by extra collections from members of the Society and other persons. Any surplus remaining after payment of the expenses was treated as part of the fund for support of the institution, and was appropriated solely to that object. Lord Denman, C.J., in giving judgment, commences as follows: "The institution is in the main charitable; first taking its origin and since, for the most part, maintained by donations and subscriptions. It is devoted to the maintenance and education of children, afforded to them, in a great proportion gratuitously. The trustees, managing committee, and subscribers, receive no pecuniary benefit and the servants of the establishment no more than may be considered as mere wages for their services. And, so far as regards the premises in question, they are found to have no other accommodation from them 'than is essentially requisite for the discharge of their duties connected with the school.' . . . But, even in the hands of the Society, there is a circumstance connected with the occupation which brings it within the ordinary rule, and distinguishes it from those cases of occupation for charitable purposes which have been considered not rateable, as not beneficial. The circumstance is the payment of the £12 per annum, by or on behalf of each scholar. This sum, it is true, is not adequate to the expense, and in a popular sense, does not make the occupation of the premises beneficial, *i.e.* gainful. But still it is a revenue which the building produces, and actual gain on a balance of profit and loss is not needful; it is enough if a revenue be produced."

It is true that the question to which these observations were directed was whether the occupation was beneficial — a matter which in England, since the decision in the *Mersey Dock Co.* v. *Cameron* (1) has not been, and which in Ireland, under the Irish

(1) 11 H. L. Cas. 443.

Valuation Acts, never has been, the test of exemption from rating. It is settled under our Valuation Acts that although occupation by a trustee for charitable purposes is beneficial, in the sense in which that word is used in such cases as *The Queen* v. *Sterry* (1), it is still within section 2 of 17 & 18 Vict. c. 8; and for that reason I desire to guard myself against the expression of any opinion as to the application of the passage I have read to the interpretation of our statute law, in reference to a case in which the *entire* possible profit from the occupation is bound by an enforceable charitable trust.

The question was again considered in the *Magee College Case* (2). That college was founded and endowed for the education of young men in preparation for the Christian ministry in connexion with the Presbyterian Church; and, under a scheme of the Court of Chancery, a system of the highest education was provided for the students. Donors of £50, £100, or £200, towards the purposes of the institution were entitled to the nomination of certain students for free education. The trustees did not receive any payment whatsoever from the students; but all such students, except those who had been placed on the foundation by the donors, as provided by the scheme, paid to the professors such fees as were from time to time fixed by the General Assembly. In addition to those fees the respective professors received under the scheme yearly, out of the endowment, the sum of £250, and the residue of the income of the trust fund was applied towards the general purposes of the trust. In that case the college was held not to be used exclusively for a charitable purpose. In giving judgment, O'Brien, J., says:—"It appears . . . that the education of the students is not altogether gratuitous, but in addition to the said £250 a year, payable out of the endowment fund, the professors are entitled to receive from the students, and the students are bound to pay them, certain fees, the amount of which does not appear to have been settled, but is to be fixed from time to time by the General Assembly. It may happen that they would be fixed at such an amount as would constitute the greater part of the professors' salaries; but, whatever the amount

(1) 12 A. & E. 84. (2) Ir. R. 4 C. L. 438.

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may be, the result of the payments is that the institution would be supported partly by Mrs. Magee's legacy, and any further voluntary contributions, and partly by the students' fees, from which some profit would be derived; and the question of the right to exemption should not be affected by the proportion which the amount of the bequests and the voluntary contributions may bear to the amount contributed by the students."

I concur in this portion of the judgment of Mr. Justice O'Brien, so far as it refers to a case such as that then before him, in which the sums payable by the students are not themselves bound by a charitable trust.

It was argued for the respondents that the principle of that case was not applicable to the present, because it is found that the sums paid by these paying pupils are applied for their maintenance, and if there be any surplus it is carried to the credit of the National Board. Now, had it appeared that under the Rules of the National Board there was an *obligation* upon the managers of the college to bring to the credit of the National Board the profit, if any, which was derived from these paying pupils over and above their maintenance, a question would have arisen, upon which I do not express, and indeed have not formed, any opinion. To determine it, it would be necessary to consider whether the passages which I have read from the judgment of Lord Denman in *The Queen* v. *Sterry* (1), and which were applied by Mr. Justice O'Brien in the *Magee College Case* (2), are applicable to such a case.

But having carefully considered the Rules of the National Board, I am clearly of opinion that the college is not subject to the obligation suggested. It is admitted that it is not imposed upon it in express terms by the Rules, and the only matter relied on as suggesting it is that the sums received from the pupils are brought to the debit of the college in its audited accounts.

There is no doubt that the sums received from the paying pupils must be dealt with in some manner by the National Board in auditing the accounts, because the Training College is under

(1) 12 A. & E. 84. (2) Ir. R. 4 C. L. 438.

an obligation to apply the entire amount of the grant to the purpose for which it receives it. It follows that the expenses incurred by the college for the board and lodging of students, comprising, in addition to "Queen's scholars" and other persons admissible under the Rules of the National Board, pay-pupils who cannot be recognised by the Board, could not be legitimately allowed in their totality as credits against the Government grant. As, however, it appears from the books which were given in evidence, separate accounts were not kept by the managers of the college of the expenses incident to the maintenance of each of these two classes of students, the auditor would be obliged to apportion, as between the two classes, the expenses incurred in respect of both classes jointly; and it may be that in doing so it would have been just to treat the expense of the maintenance and instruction of each pay-pupil as amounting to £50 a year, being the sum which the Government allowed in respect of each "Queen's scholar." If the sum were so estimated it would have been right to have allowed, as against the Government grant, not the entire expenses incurred, but those expenses diminished by the sum of £500, as the estimated proportion of such expenses to be attributed to the pay pupils. Whether this was or was not the principle on which the accounts were audited we do not know; but the possibility of its having been adopted shows that the mode in which the accounts have been audited is entirely consistent with the non-existence of any obligation to bring to the credit of the Board the profit, if any, on the pay-pupils.

I desire, however to add, and to base my judgment upon this, that, even had this been otherwise, I could not regard the action of the auditor, or of the National Board in adopting or acting upon his decision, as in any way altering or affecting the fundamental Rules under which this Training College is recognised, and certainly not as extending the obligation to which by those Rules Training Colleges are subjected.

For these reasons I am of opinion, that the college was not used "exclusively for charitable purposes," within the meaning of the 17 Vict. c. 8, sect. 2, read, as it must be, in connexion with and subject to the 15 & 16 Vict. c. 63.

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It is hardly necessary to occupy public time in discussing the question whether the education of "Queen's scholars," in addition to being a "charitable," is a "public" purpose, within the meaning of the Valuation Acts. I am inclined to the opinion that it is; but, for the reasons already given, I hold that the college was not used "exclusively" for such purpose, within the meaning of the 1 & 2 Vict. c. 56, sect. 63. Neither is it necessary to decide whether the college is a "hereditament of a public nature occupied for the public service," because, even if it were, it would not be exempt from taxation, unless it were "altogether" of such nature: 15 & 16 Vict. c. 63, s. 16; and the same reasons which show that its use was not exclusively for charitable purposes, show that it was not "altogether" of a public nature. I may add, however, although I do not actually decide the question, that in my opinion these Training Colleges, with the exception of that in Marlborough-street, are in no sense of a public nature, or occupied for the public service; and I conceive that such exemption from taxation as they may be entitled to, must depend upon their charitable character.

Upon the whole, I am of opinion that this college is not exempt from taxation, that all the questions in the Special Case must be answered in the negative, and that the decision of the Quarter Sessions must be reversed; but, under the circumstance, the reversal will be without costs.

ANDREWS, J.:—

The question which we have to determine upon this case stated is whether the college buildings and land therein mentioned were exempt from rateability in the year 1895, by reason of their being of a public nature, and occupied for the public service, or used for charitable purposes under the 2nd section of the 17 Vict. c. 8, which, by its 6th section, is to be construed together, and read as one Act with the 15 & 16 Vict. c. 63, the 16th section of which enacts that no hereditaments or tenements shall be deemed to be of a public nature, or used for (*inter alia*), charitable purposes, unless they shall be altogether of a public nature or used exclusively for such

purposes. The premises in question belong to, and the college was built out of the funds of, the De La Salle Community, referred to in the case stated, and are in no way public property. They constitute an educational establishment, and the brethren who conduct it receive and apply Government grants of public money for its educational purposes. The education supplied is to a very large extent gratuitous, but there are some pupils, called extern students, who are admitted for a yearly payment of £50 each. It appears that the sums received from these paying pupils amounted in the year 1894 to £500. It also appears that the surplus balance of the receipts of the establishment is, as I understand the Case Stated, in effect credited to the Government grant; and I will assume, from what is stated in the case, that the entire surplus balance of the receipts of the establishment, including the amount received from the paying pupils, after providing for its outgoings and working expenses, is expended for its educational purposes, which I will also assume, without so deciding, to be in their character "charitable purposes," within the meaning of the Acts I have referred to; but the case does not find, and I have been unable to discover any evidence that the community, or the managers of the establishment, are under any legal obligation so to expend the sums received from the paying pupils, and I am therefore of opinion that, as matters stood in 1895, and apparently still stand, the hereditaments and tenements which constitute the establishment in question are neither "altogether of a public nature," nor used exclusively for charitable purposes, so as to come within the statutory exemption, and therefore were not exempt from rateability in the year 1895. In the case of *The Trustees of the Magee College* v. *The Commissioner of Valuation* (1), in which fees were paid to the professors by the pupils, it was held that the institution was not exclusively charitable, and therefore not exempt from rateability. I think it appears from the judgments in that case that the fact that fees were paid by the pupils would alone have been sufficient to prevent the institution from being held exempt from rateability.

The question in the present case must of course be decided

(1) Ir. R. 4 C. L. 438.

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on the construction of the Irish Acts. The English Poor Law Act of Elizabeth, and the decisions upon it, even before the decision in *The Mersey Docks Company* v. *Cameron* (1), have no direct application, but the observations of the learned Judges in some of the English cases are, as I think, relevant and important. In *The King* v. *The Inhabitants of St. Giles* (2), an asylum which had been established for the gratuitous reception of pauper lunatics, but into which were afterwards admitted some paying patients, the profits from whose payments were applied for the support of the pauper patients, was held to be rateable, although, but for these payments, it would have been held exempt. Lord Tenterden, in giving judgment, said:—"Upon these facts it seems to us impossible to say that this building does not produce a profit, by means of the entertainment of those persons who are able to pay for their reception; and, if any profit be made, the application of it, when made, is immaterial as to the question of rateability." In *The Queen* v. *Sterry* (3) the institution in question had been established by voluntary subscriptions for the education and maintenance of the poor children of the Society of Friends. Each child was required to contribute £12 yearly towards his expenses, which was insufficient to defray his actual expenses. All surplus funds were applied for the purposes of the institution, and neither the trustees, nor the committee received any personal benefit from the funds. Exemption from poor rate was claimed on the ground that the premises were used exclusively for charitable purposes; but they were held rateable, although it appears that but for the yearly payment of £12 they would have been held exempt. I refer to this case, not for the actual decision, but for the observations of Lord Denman, who said, with reference to the yearly payment—"This sum, it is true, is not adequate to the expense, and, in a popular sense, does not make the occupation of the premises beneficial, *i.e.*, gainful; but still it is a revenue which the building produces; and actual gain on a balance of profit and loss, is not needful."

I do not think it necessary to refer to the other English cases on the subject. The judicial observations I have mentioned were

(1) 11 H. L. Cas. 443, 485. (2) 3 B. & Ad. 573. (3) 12 A. & E. 84.

cited with approval by Mr. Justice O'Brien in his judgment in the *Magee College Case* (1), in which he said that the payment of fees by the pupils of that college brought the case, in his opinion, within the principles of the cases referred to, which, so far as relates to the sums paid by the extern students, appear to me to be equally applicable to the present case.

For this reason, therefore, I am of opinion that the premises in question in this case were not exempt from rateability in the year 1895, and that the decision of the Court of Quarter Sessions ought to be reversed. Having regard to what I have said, it may not be necessary to add, but I wish to state distinctly, that my judgment in the present case is based solely upon what I understand to have been the facts as they existed in 1895, with respect to the payments by the extern students, and I offer no opinion as to the effect of any possible change therein.

MURPHY, J., concurred.

PALLES, C. B.:—

Under the circumstances we will direct that each party shall abide their own costs.

Solicitors for the Waterford Guardians: *Dobbyn, Tandy, & M'Coy.*

Solicitor for the De La Salle Community: *A. Kelly.*

Solicitor for the Commissioner of Valuation: *The Chief Crown Solicitor.*

J. P. B.

(1) Ir. R. 4 C. L. 438.

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April 20, 21, 28.

IN THE MATTER OF THE GENERAL VALUATION ACT, 1852, AND OF THE ACTS RELATING TO THE VALUATION OF RATEABLE PROPERTY IN IRELAND; AND IN THE MATTER OF THE VALUATION OF THE CLONBROCK COAL COMPANY. THE COMMISSIONER OF VALUATION, APPELLANT; THE CLONBROCK COAL COMPANY, RESPONDENTS (1).

Valuation Acts—Colliery—Principle on which valuation is to be made.

The valuation, under the Valuation Acts, of rateable coal mines in Ireland is to be made upon the following principle, namely, upon an estimate of the net annual value thereof, *i.e.* the rent for which, one year with another, they might, in their actual state, be reasonably expected to let by the year, upon the terms of the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in their actual state, and all rates, taxes, and public charges, if any, except tithe rentcharge, being paid by the tenant. No allowance is to be made for sunk capital. Royalties paid are evidence of the letting value, but are not conclusive.

CASE STATED by the Chairman of Quarter Sessions for the Queen's County, upon an appeal by the Clonbrock Coal Company from a revised valuation of their colliery, which valuation was fixed by the Commissioner of Valuation at £1000 yearly. The case was heard before the County Court Judge and two other magistrates.

Although, as will be seen, the judgment of the Divisional Court on the case stated, turned exclusively upon the legal principles upon which such a valuation should proceed, it has been thought that having regard to the importance and complexity of questions of this kind, the points raised and the effect of their Lordships' judgment may be more fully appreciated by reporting the evidence given at Quarter Sessions which was as follows:—

Michael Dodd deposed that he is a mining engineer, and a

(1) Before ANDREWS and MURPHY, JJ.

partner in the Clonbrock Coal Company: is also part proprietor of the Wallbottle Colliery in England, and has been manager of other collieries in Northumberland. The Clonbrock Company holds under lease (produced), dated 2nd June, 1883, for thirty-one years from T. Lane, and another to T. Robson at a royalty of one-twelfth of the value of the coal won. There is a power of giving twelve months' notice to determine the lease. Under conveyance of 5th September, 1890 (produced) the Clonbrock Company purchased the colliery for £4000 (of which £900 represented the stocks in hands at the pit's mouth). The colliery is about ten miles from Carlow, sixteen from Kilkenny, fourteen from Abbeyleix, twelve from Athy, and twenty from Maryborough. We employ 250 men in the mine, and our fortnightly wages bill comes to between £420 and £440. There is considerable difficulty in working it, owing to the presence of water in old workings adjoining and it has to be done with great caution. The actual state of the mine is worse than appears on the map. The water is pent up in old workings behind, in front and overhead and it is by great care and skill we avoid danger. We undertake exceptional risk in working it. In fact at the commencement a mining engineer who examined it advised us not to run the risk.

The royalties paid for the year 1891–1892 were £652 16*s.* 9*d.*

The royalties paid for the year 1892–1893 were £643 8*s.* 5*d.*

The royalties paid for the year 1893–1894 were £616 9*s.* 10*d.*

The royalties paid for the year 1894–1895 were £672 10*s.* 8*d.*

The profits for 1893 were £1633 before deducting the proportion of capital to be written off or interest upon capital; and for 1894, £1500 subject to some deductions.

The capital stood as follows:—

A paper was handed in showing that the capital invested in the mine was £4100 and it was explained that the colliery would be exhausted in six years working, from which the bench were invited to draw the inference that one-sixth of the capital (equal to £683) ought to be returned, each of the six years before the net profits for that year were arrived at.

In 1894 the colliery was valued for the first time (seven years after the opening of the mine). It was valued at £1600. Owing to an oversight of mine, no appeal was taken against the value.

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We were obliged to pay on this value poor rate at 2*s.* in the £, and county cess at 2*s.* 6*d.* in the £. It is now valued at £1000. My own view of the value is that it is about £600. I have had great experience of assessing collieries in England. Last year Clonbrock paid in rates 3*d.* per ton on its output. The Wallbottle Colliery in Northumberland, of which I am one of the owners, during the same period paid in rates one-sixth of a penny per ton on its output. The Jarrow pit, which produces about the same as the Clonbrock, is valued at £550. I produce a table showing the valuation of the other coal mines in the Kilkenny coalfield, and I also produce a table showing the assessment of the Clonbrock mine for the years 1894–1895, as compared with the Kilkenny mines and with the Wallbottle in Northumberland, by which it appears that Wallbottle is assessed for 1894, at a value of 3·93*d.* per ton of produce, the four Kilkenny mines at a value of 5·56*d.* per ton of produce, the Clonbrock at a value of 13·61*d.* per ton. of produce, and the Clonbrock for 1895, at a value of 8·50*d.* per ton of produce.

The Clonbrock coal is not suitable for domestic purposes. Swansea coal has superseded it for malting. It was used largely for malting, but lately Guinness & Company have issued a circular to their maltsters not to use coal from the Kilkenny coalfield, as the sulphur is supposed to impart a flavour to the malt. The total output for the four Kilkenny collieries for 1893 was, according to the Bluebook, 51,578 tons. They are valued at £1195, in the aggregate. Our total output for the same year was 28,196 tons and we were valued on that output at £1600, and this year at £1000. The mine will be worked out at the end of next year, or a month or two into 1897. Cross-examined (as to why he did not appeal from the assessment of £1600). We had received no notice of the assessment, and when we saw the published notice it was too late. We were under the impression that the gentleman who came to inspect the mine and to take our figures would have sent us notice when he made the assessment, but he did not do so. He said we would get notice of the assessment but we got none until we saw the published notice, and we were then advised that it was too late to appeal.

R. Thompson Swallow deposed that he is a Mining Engineer and part proprietor of several collieries in Durham and Northum-

berland, is intimately acquainted with the mode of rating collieries in England. Has been on the assessment committee for about twenty years. In Chester-le-street, the assessment is at the rate of 4½*d.* per ton on the output. In South Shields, at 3½*d.* per ton. In Lancaster, 5⅝*d.* less one-fifteen or about 5½*d.* On an average all round the assessment is about 4½*d.* per ton. The system of assessment is by arrangement between the coal owners and the assessment committees. I examined the Clonbrock colliery yesterday and saw the map of the workings. Looking at it as it is, two years at the present output would exhaust the colliery. Asked by the Bench:—What is its fair letting value as it stands? Answer:—I should not like to give more than £600 per annum for it, *i. e.* covering the Royalty and including it, and about the same as the Royalty.

This closed the case for the owners of the mine.

J. G. Barton, Commissioner of Valuation, was examined in support of the valuation and deposed as follows:—

The valuation of Ireland was originally made under the 15 & 16 Vict. c. 63. It is annually revised (17 Vict. c. 8); the machinery of revision is that the Rate Collectors give to the Clerk of the Union a list of what they think requires revision. The Clerk of the Union before the 15th November in each year submits it to the Guardians, and the Guardians after the 28th November forward it to my office in Dublin. The valuers are put down by me, and their men investigate the different cases sent from the different Unions. We have no power to alter the value of land except fisheries, railways, canals, tolls, mines, &c. All (except buildings), are valued the same as in England (15 & 16 Vict. c. 63, s. 11), the principle is on estimate of the net value, *i.e.* the rent for which one year with another in their actual state the hereditaments would let. The valuation in Clonbrock was made on the following elements:—

1. Amount of coal won. 2. Price paid for it at the pit's mouth. 3. Cost of working. 4. Interest on capital. 5. Allowance over for the capital employed. 6. Trade profits on capital. 7. Contingencies; and it worked out to £1040, for which a round sum of £1000 was taken. The net profits were taken at £2200 (before deducting the Royalty of £670) from which certain

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estimated deductions were made for interest on floating capital (taken at 5 per cent. on £1000) trade profits (taken at 10 per cent.) contingencies (taken at 2½ per cent.) interest on value of machinery, plant, stores, &c. (taken 5 per cent. on £2000) contingencies for exceptional risk (taken 10 per cent.) rates (taken at 4*s.* 6*d* in the £) and adjustment of existing valuations in same rateable district (taken at 20 per cent.) which reduced the figure to £1040 on which the valuation was fixed in round numbers at £1000. Cross-examined:—Has no personal knowledge of the Queen's County collieries. It is not likely that the £1000 a-year value for the Clonbrock mine and the valuation of the Kilkenny Collieries are both right. The low valuation of the Kilkenny Collieries was due to the fact that the valuation had not been revised for many years and then stood at amounts representing the rateable value before they had fully developed. Have made no allowance for the exhausting of the coal there in two years, except the 25 per cent. of the gross value of the plant. The reviser who visited the colliery was Mr. Tighe. He only got the information. I valued the colliery myself. The presence of water in the old workings was taken into account in the cost of working, but I have allowed nothing specifically for it.

The learned County Court Judge stated that the view taken by the Bench was, that both valuations were more or less estimates and that £600 was in round numbers about the true value. He announced their decision in the following terms:—

We have carefully considered the case, and arrived at the conclusion that the valuation ought to be reduced to £600. If we go on the English system as explained by Mr. Swallow the total output is 28,000 tons, and taking the average English assessment at 4½*d.* per ton it works out to £560. If we go on the "net profits" the profits may be taken at £1500, but before that is a net profit you must take off not only interest on the capital engaged, but also a proportion of the capital itself, which will be extinguished in a period of six years; that comes to about £800, which leaves a net profit of about £700. We take neither the £700 nor the £560, but a rough mean between them and fix the value at £600.

When we announced our decision we were invited by Mr. M'Laughlin to state a case for the opinion of the High Court, and

some discussion took place, Dr. Houston contending that there was nothing to state a case about. That was my own opinion, but—as some reference was made to a *mandamus*, I said it was simpler to state the facts at once in the form of a case than on a rule *nisi* for a *mandamus*, and that I would do so if the Commissioner of Valuation insisted in it. I accordingly state the evidence given before us, on which we arrived at our estimate of value, but in my opinion our decision involved no legal principle. If, however, the Court should be of opinion that it did and that we took the wrong view of it, our decision should be reversed, and the matter should be referred back to us for further consideration: otherwise our decision should be affirmed.

J. F. Vesey Fitzgerald (with him *R. E. Meredith, Q.C.*), for the appellant, the Commissioner of Valuation.

Matheson, Q.C. (with him *Houston, Q.C.*), for the respondents.

Cur. adv. vult.

ANDREWS, J.:—

April 28.

This was a case stated under the 10th section of "The Annual Revision of Rateable Property (Ireland) Amendment Act, 1860" (23 Vict. c. 4), by Judge Fitz Gerald, as Chairman of the Court of Quarter Sessions for the Queen's County, held at Carlow in October last.

In 1895 the Commissioner of Valuation under the General Valuation (Ireland) Act of 1852 (15 & 16 Vict. c. 63) and the Amending Act of 1854 (17 Vict. c. 8), which provides for an annual revision, when requisite, of the hereditaments therein mentioned, including mines, revised the valuation of the colliery of the Clonbrock Coal Company, in the Queen's County, and fixed it at £1000, and entered the valuation in his lists accordingly. The Company appealed therefrom to the Quarter Sessions, under the 22nd section of the Act of 1852. The Quarter Sessions reduced the valuation to £600, and the Chairman, upon the requisition of the Commissioner of Valuation, while entertaining the opinion "that there was nothing to state a case

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about" and that their decision "involved no legal principle," stated the case which was argued before us on the 20th and 21st instant. Owing to the view taken by the learned Chairman no question of law "which arose in relation to the Acts relating to the Valuation or Revision of the valuation" of the colliery is expressly stated, but it sufficiently appears from the case, and the argument upon it, that the following question of law did arise and must be determined, viz. whether the valuation of opened and rateable coal mines in Ireland, under the Valuation Acts, is to be made upon any, and, if so, what legal principle? Dr. Houston argued on behalf of the Company that there was no such principle; that the Legislature had left the matter entirely at large; and that the Quarter Sessions, having no legal principle to guide them, were to decide the matter of the appeal as best they could. This rather startling contention was not adopted, at least to its full extent, by Dr. Houston's colleague, Mr. Matheson. If it were held to be correct, prompt legislation would certainly appear to be requisite to rescue the valuation of rateable mines in Ireland from a condition which would be little short of chaotic, and to relieve the Commissioner of Valuation and the Courts of Quarter Sessions from the embarrassments and uncertainties in which such a decision would involve them.

Opened mines were included in the rateable hereditaments under the Irish Poor Relief Act of 1838 (1 & 2 Vict. c. 56, s. 63), and the principle on which their value in common with the other rateable hereditaments therein mentioned was to be ascertained, for the purposes of rating under that Act, was (as prescribed by the 64th section) an estimate of the rent at which one year with another they might in their actual state be reasonably expected to be let from year to year, subject to the other provisions of that and the preceding section. The Valuation Amendment Act of 1846 (9 & 10 Vict. c. 110) provided for the appointment of a Commissioner of Valuation for Ireland, and by section 9 enacted that he should cause to be valued every tenement which was a rateable hereditament under the Act of 1838, upon an estimate of the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year, subject to the provisions of that section. This, it will be

seen, was the same principle as was prescribed by the 64th section of the Act of 1838; and from 1838 until 1852 rateable mines in Ireland were required to be valued upon this principle. By the 3rd section of the Act of 1852 the Act of 1846 was repealed, save as to valuations wholly or partially completed thereunder. So far as valuations thereunder were partially but nearly completed they were to be completed pursuant to its provisions, and such wholly completed valuations and the partially completed valuations, when completed, were to remain in force until altered, or revised under the Act of 1852 (section 3). By the 11th section of the Act of 1852 a new principle was prescribed for the valuation of land, owing apparently to the effect of the preceding famine years on the letting value of land, and after 1852 the annual value of land became ascertainable by reference to the prices of certain classes of agricultural produce. As regards houses and buildings the principle of valuation which had been prescribed by the Acts of 1838 and 1846 was re-enacted. Opened mines continued to be expressly included among the rateable hereditaments under the Act of 1852 (section 12), but no principle of valuation was thereby enacted with reference to mines. This cannot be regarded as either satisfactory legislation or careful drafting of the Act; but I think it impossible from this omission to come to the conclusion that the Legislature which made express provision for the valuation of other classes of rateable hereditaments intended to leave the valuation of rateable mines, which had for so long been valued on a definite principle prescribed by the statutes I have referred to, wholly unprovided for, and without any principle applicable thereto. If this was the almost inconceivable intention, how was the Commissioner of Valuation to act, and how was his valuation to be appealed from, and, if appealed from, how was the appellate tribunal to decide? There is nothing in the Act of 1852 to show that the previous principle of valuing rateable mines was in any way objectionable, or required change. I am not aware of there having been any reason whatever for changing it or for abolishing it; and the Legislature may well have intended that the valuation of such mines, so far as principle was concerned, was to go on as before. The law in England on this subject appears to have been in a very unsatisfactory state for the long period which

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elapsed between the passing of the English Poor Relief Act of 43 Eliz. c. 2, and the 6 & 7 Wm. 4, c. 96. No principle was laid down in the Act of Elizabeth upon which the taxation thereunder was to be imposed. This led to uncertainty and confusion, and naturally cases were brought into Court which raised the question of principle especially in relation to coal mines, which were named in that Act as rateable property, and became of so great importance and value in England. By decided cases, of which I need not refer to more than that of *Rex* v. *Attwood* (1), which had reference to a rate made in 1825, the principle was laid down of rating coal mines upon their letting value. In delivering the judgment of the Court in that case, Chief Justice Abbott said :— "We are all of opinion that the owner and occupier of a coal mine should be rated at such sum as it would let for, and no more." This of course meant the sum which a prudent tenant could afford to give and would give. It does not necessarily mean the sum which an actual tenant pays, which may, in many cases, be more, or less than the letting value. In 1836 this principle of valuation was enacted in England by the 6 & 7 Wm. 4, c. 96, which by sect. 1 required the poor rate to be assessed "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year," subject to the provisions therein mentioned; and from that time coal mines in England were required by statute law to be valued for rating upon this principle. Having regard to the state of the law in both England and Ireland before and up to 1852, and to the principle on which in 1852 coal mines were, and for many years had been valued for rating, I am satisfied that it was not intended by the Act of 1852 to abolish or alter the then existing principle of valuing coal mines for rating purposes in Ireland, and that that principle, which appears to have been acted on ever since, remains undisturbed. In my opinion therefore the answer to the question of law which arises in the present case is that the valuation under the Valuation Acts of coal mines in Ireland, which have been opened for a sufficient period to become rateable, is to be made upon the

(1) 6 B. & C. 277.

following legal principle, namely, upon an estimate of the net annual value thereof, that is to say, the rent for which one year with another they might *in their actual state* be reasonably expected to let, from year to year, the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in their actual state, and all rates, taxes, and public charges, if any, except tithe rentcharge, being paid by the tenant. This is the principle which was prescribed by and acted on after the passing of the Act of 1832, was continued by the Act of 1846, and, in my opinion, was neither abolished nor altered by the Act of 1852, since which it has continued to be acted on.

Mr. Matheson however argued that assuming this to be the proper principle (which he did not appear to very seriously controvert, though I do not take him to have admitted it), still, in looking into the case stated it would appear that the Quarter Sessions in fact adopted it. I cannot come to this conclusion. The terms in which the Chairman announced the decision of the Court, and which he has has given to us verbatim in the case, coupled with his own expressed opinion that the decision involved no legal principle, appear to me to show clearly that no definite principle was adopted, and that the Court decided the appeal on no fixed principle at all, but arrived at their conclusion because they thought, having regard to what they had heard (a good deal of which, I venture to think, was not calculated to afford them much assistance) that £600 was a fairer sum than £1000. The result is that their decision must be discharged, and that under the 11th section of the Act of 1860 the matter of the appeal must be remitted to the Court of Quarter Sessions for rehearing and determination, with the decision of this Court thereon, laying down the principle upon which the valuation of the colliery is to be made. It will be observed that the colliery, for the purposes of this valuation, is to be dealt with as *in its actual state*. What is to be arrived at is the rent at which it might, *in its actual state*, be reasonably expected to let from year to year, the tenant paying the specified probable annual costs, expenses, rates, taxes, and public charges. The royalties paid by the tenant may be had regard to as evidence to assist this Court in arriving at the letting value. They are not necessarily conclusive as to the letting value,

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and they are not to be dealt with as *deductions*, nor is it admissible to take off by way of allowance any proportion of the sunk capital, which, no doubt, will, in whole or part, be sooner or later extinguished. The occupier of a coal mine is rateable upon it as in its actual state, though in the end he may never be recouped his outlay in bringing it into a productive condition, and may have made a losing speculation in it. Every improvement he makes presumably increases the value of the mine, and it is upon its actual improved value that it is to be rated. A man who builds or buys a house is to be rated on the value of the house as built or bought, and is not entitled to any deduction towards recouping the capital he expended in building or buying it, and which may never be recouped. In this respect there is no distinction between building or buying a house, and opening up a mine and bringing it into a productive state. I may refer on these points to the cases of *Rex* v. *Parrot* (1); *Rex* v. *Attwood* (2); and *Rex* v. *Lord Granville* (3), amongst the many decisions on similar questions. The recent case in the House of Lords of the *Coltness Iron Co.* v. *Black* (4), (which however had reference mainly to income tax and the statutes relating thereto) may also be usefully referred to. Mr. Barton, the Commissioner of Valuation, would appear from the case stated, to have proceeded in his method of valuation upon the proper *principle*. His figures would not, of course, conclude the Court of Quarter Sessions which would be entitled and bound to consider for itself the evidence properly applicable to the various matters which ought to be taken into account in order to arrive at an estimate of the amount of rent which the supposed tenant would pay for the colliery in its actual state. This must of necessity be the subject of an estimate, but if the proper principle be acted on, the result can, I have no doubt, be arrived at with a tolerably near approximation to accuracy and justice. I have only to add that, under all the circumstances, we think the parties should abide their own costs of the case stated, and the argument thereon.

MURPHY, J., concurred.

Solicitor for appellant: *The Chief Crown Solicitor.*

Solicitor for respondent: *V. Kilbride.* J. P. B.

(1) 5 T. R. 593. (2) 6 B. & C. 277. (3) 9 B. & C. 188. (4) 6 App. Cas. 315.

PARNELL *v.* BOYD (1).

Q. B. Div. 1895. Nov. 21–23. 1896. Feb. 1.

Appeal. Feb. 27, 28. April 28.

Will—Absolute gift followed by gift over of property undisposed of—Estate pur autre vie*—Power of sale—Election—Disclaimer.*

B., who was possessed of a house in Stephen's-green, Dublin, held under a lease for three lives, by his will dated the 27th May, 1833, devised to his eldest son J. R. B. his house in Stephen's-green, with all the furniture therein (excepting such articles as his wife might select to take to Ballymacool), his pictures, books, private books of prints, coins, wines, and everything contained therein, except plate and linen, he paying the rent thereof, and in case that his said son J. R. B. should not think proper to occupy or keep his said house, he might be at liberty to sell the same, together with (if he thought proper) the pictures, coins, wines, &c.; but it was the testator's wish that his books should not be sold, but remain in his family; the amount of the sale to be applied to his own use and benefit; and in case his eldest son J. R. B. should die without having a family before he should have sold the said house, the testator devised the house in the same manner to his second son W. B.; and in case he should so die, the house was to be sold, and the proceeds divided among his daughters.

The testator died in 1836, and J. R. B. entered into possession. He died in 1890, having by his will devised all his property to the defendant, who entered into possession of all the property except the house in Stephen's-green, Dublin. By deed poll, dated the 16th March, 1895, the defendant disclaimed the interest in this house. In an action against the defendant for arrears of rent of this house:—

Held (affirming the judgment of the Queen's Bench Division, from which Johnson, J., dissented on the question of construction), that J. R. B. took the house absolutely under the will of the original testator, and not for life only, and that it was not competent for the defendant to disclaim one portion of the property devised to him by the will of J. R. B., while accepting the rest.

MOTION to enter judgment for the plaintiffs.

In and prior to the year 1826, John Lloyd, Robert Ward, Mary Anne Symes and Henry Mahon were seized in fee as tenants in common of two undivided third parts of the house, No. 76, Stephen's-green, Dublin, and John Parnell, then a minor, was seized in fee of the other third as tenant in common with them.

(1) In the Queen's Bench Division before O'BRIEN, JOHNSON, and HOLMES, JJ.

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By indenture dated the 13th June, 1826, John Lloyd, Robert Ward, Mary Anne Symes and Henry Mahon, demised the two undivided thirds of said premises unto John Boyd, his heirs, and assigns, for three lives and the survivors and survivor of them at the rent of £80 of the late currency of Ireland equivalent to £73 17*s.* sterling.

John Parnell attained age in 1833, and by indenture dated the 6th December, 1833, he demised the undivided third share in the said premises to John Boyd for the lives of the same three persons and the survivors and survivor of them at the rent of £36 18*s.* 6*d.* making the total rent £110 15*s.* 6*d.*

John Boyd made his will on the 27th May, 1833, the material part of which was as follows:—"I give and bequeath to my eldest son John Robert Boyd, my house in Stephen's-green with all the furniture therein (excepting such articles as my wife may select to take to Ballymacool), my picture books, prints, books of prints, coins, wine, and everything contained therein, except plate and linen, he paying the rent thereof; and in case that my said son John Robert shall not think proper to occupy or keep my said house he may be at liberty to sell the same together with, if he thinks proper, my pictures, coins, wines, &c., but it is my wish that my books should not be sold but remain in my family; the amount of the sale to be applied to his own use and benefit; and in case my eldest son John Robert should die without having a family before he shall have sold my said house, then and in that case I give and devise my said house in the same manner to my second son William Boyd, and in case he shall so die, I desire that my house, pictures, and coins may be sold and the produce divided among my daughters then living. I give and devise to my wife during her life, my plate, and linen, to be used by her as hitherto, and upon her death I give all my plate and linen to my eldest son John Robert, and if he dies unmarried, to my second son William, and if he dies unmarried, to the eldest of my daughters who shall be married and have issue alive." The testator named his sons John Robert and William residuary legatees (1).

John Boyd died on the 21st October, 1836, after which John

(1) Other dispositions of the will, which Johnson, J., considered of importance as supporting his view of the construction, will be found stated in his judgment, *infra*, p. 581.

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Robert Boyd, went into possession. John Robert Boyd made his will on the 27th March, 1890, whereby he devised to his nephew William Henry Porter, the defendant, all his landed property on condition that he should within six months after the testator's death, take the name and arms of Boyd. John Robert Boyd died without issue on the 30th March, 1891, and the defendant assumed the name and arms of Boyd within six months from the death of John Robert Boyd and entered into possession of the landed property of the testator, save the house in question, which had turned out to be onerous. On the 16th March, 1895, William Henry Boyd executed a deed poll disclaiming all interest in the house in Stephen's-green.

One of the lives in the original lease was still in being, and the estate of the lessors in the original lease became vested in the plaintiffs, who brought an action against William Henry Boyd for £387 13*s.* 8*d.*, being three and a-half years' arrears of rent of the premises. The case was tried before Gibson, J., without a jury, on the 28th June, 1895, who found for the defendant, reserving leave to either party to move for judgment. The plaintiffs applied to the Queen's Bench Division for judgment.

Houston, Q.C. (*W. P. Ball*, with him), for the plaintiffs.

Matheson, Q.C., and *Brunskill*, for the defendant.

Cur. adv. vult.

1896. Feb. 1.

HOLMES, J. :—

This action has been brought to recover arrears of rent due under two leases by which the house, 76, St. Stephen's-green, in this city, was demised for three lives, one of which is still in being. The reversion expectant on these leases now belongs to the plaintiffs, who allege that at the several dates at which the rent sued for became due, the leasehold interest was vested in the defendant. As the burden of the rent and covenants has for some time past largely exceeded any benefit that the tenant can derive from the property, the defendant is naturally reluctant to accept the responsibility which the plaintiffs seek to attach to him; and the object of the present litigation is to ascertain whether the former has been made the leaseholder by force of circumstances against his will.

The original lessee, a gentleman of means and position named

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John Boyd, occupied the house as a town residence; and probably never anticipated the anxiety of his grandson to keep clear of what was in his day a valuable property. The first question in the case arises upon a devise in John Boyd's will. This document was executed before the Wills Act; and, although in one way elaborately prepared, it shows neither skill in conveyancing nor much appreciation of legal phraseology. Accordingly, in interpreting it, little assistance is to be gained from comparing one portion of it with another, or from those canons of construction that have given to terms of art a certain value and significance.

The following are the words in which the house in question is disposed of:—"I give and bequeath to my eldest son, John Robert Boyd, my house in Stephen's-green, with all the furniture therein (excepting such articles as my wife may select to take to Ballymacool), my pictures, books, prints, books of prints, coins, wine and everything contained therein, except plate and linen, he paying the rent thereof; and in case that my said son John Robert shall not think proper to occupy or keep my said house, he may be at liberty to sell the same together with, if he thinks proper, my pictures, coins, wine, &c., but it is my wish that my books should not be sold, but remain in my family, the amount of the sale to be applied to his own use and benefit: and in case my eldest son John Robert should die without having a family before he shall have sold my said house, then and in that case I give and devise my said house in the same manner to my second son William Boyd; and in case he shall so die I desire that my house, pictures, and coins may be sold and the produce divided among my daughters then living. I give and devise to my wife, during her life, my plate and linen, to be used by her as hitherto, and upon her death I give all my plate and linen to my eldest son John Robert, and if he dies unmarried, to my second son William, and if he dies unmarried to the eldest of my daughters who shall be married and have issue alive."

It was argued by Mr. Matheson that the effect of this devise was to give the house to John Robert Boyd for his life only, and that, as the defendant's title to it depends upon John Robert Boyd having had power to dispose of it by will, the consequence is, that it never vested in the defendant.

It is no longer necessary to discuss the nature of estates *pur autre vie* and the rules that govern their transmission. The doubts once existing on this subject have been long since resolved, and it would be difficult to add anything profitable to the elaborate judgment of Brady, L.C., in *Brenan* v. *Boyne* (1). I assume that if this will contained no other disposition of or reference to the house in St. Stephen's-green, beyond a simple devise of it to the testator's eldest son, the effect would be to give the devisee an interest limited to his own life, but the value of this assumption to the defendant is very little when we turn to the actual language that accompanies and follows the gift to John Robert Boyd. And here perhaps it may be well to refer to what I think is the cardinal fallacy in the argument addressed to us by Mr. Matheson. Pointing out that the first few words of an unusually long sentence would if they stood alone confer only an estate for life, he asks the Court to read the complicated directions that follow as if the earlier language had given an estate of this limited character in express terms. I cannot conceive a more misleading proposition. A testator who declares that the object of his bounty is to enjoy what is given him only for his life must be supposed to understand what he says: and there is no need to look at other parts of the will for the purpose of finding out the quantity of the estate which he intends to dispose of. It is a wholly different matter where there is no express limitation. Everything referring to or connected with the bequest must then be looked to for indications of the intention. If it can be thus gathered, effect is given to it in so far as it is legally permissible. If it cannot, the question is settled by a canon of construction or a rule of law, varying with the variations in decision or legislation, and rarely having any relation to what is really contemplated by the testator. What I have just said gets rid of such cases as *Pennock* v. *Pennock* (2) so strongly relied upon by defendant's counsel. In that case an estate for life was given in distinct terms, and the controversy was whether what was manifestly intended was consistent with legal principle. In the will now under consideration we have no such certain guide. The nature of the estate which the testator meant the devisee to take is a matter of inference to be drawn from a sentence consisting

(1) 16 Ir. Ch. R. 87. (2) L. R. 13 Eq. 144.

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of many parts, each one of which, when taken by itself, is admittedly ambiguous. I am well aware that the intention evolved from a critical examination of the language of a confused and ignorant testator is sometimes as purely artificial as the result following a strict application of the rule in Shelley's case. A Court of construction in its efforts to educe light from darkness must often impute to the will-maker a knowledge which he did not possess, a discrimination in the use of language which he would not have understood and a foresight of which he was incapable. It is to the credit of counsel for the plaintiffs that they did not use the obvious but unconvincing argument afforded by the disposition of the plate and linen excepted from the gift to John Robert Boyd. "See," they might have said, "how this testator, when he desired to leave property to one person for life, and after her death to another, with an executory gift over in the happening of a specified event, but in other respects absolutely, see how he could effect his object in clear and appropriate language?" And yet perhaps the true explanation of this apparent accuracy is that even the most clumsy and careless draftsman will sometimes blunder into a form of bequest that is at once precise and legal. There must, however, be some way of ascertaining the meaning of testators; and I know of no better than by giving them credit for some knowledge and intelligence, and by placing a reasonable construction on their words.

I have already read everything to be found in the will of John Boyd relating to the house in St. Stephen's-green; and, before examining it more minutely, I would ask, What is the general impression conveyed by the terms of the bequest? Is it not that John Robert Boyd is made the absolute owner in the event of his having a family that survive him? I asked, on more than one occasion, counsel for the defendant, what, according to the intention of the testator as expressed in the will, was to become of the house upon the death of John Robert Boyd leaving children? but no definite reply was forthcoming. The process of exhaustion may assist us to a conclusion. The second son would not take. There is, admittedly, no gift by implication; and therefore the children of the eldest son would not take. There is no residuary devisee to take. So that the result of adopting Mr. Matheson's

argument is that, notwithstanding the elaborate directions contained in the will about this house, there would be an intestacy upon the happening of an event which was in itself highly probable, and which the very terms of the gift show was within the contemplation of the testator. This absurd consequence is avoided if the will be construed as giving the eldest son the entire leasehold interest in every event, save in that specially excepted, namely, his dying without having a family before he had sold the house.

A critical analysis of the language leads to the same conclusion. In the beginning of the bequest the house is associated with the furniture, pictures, books, prints, coins, and wine therein. To the books alone, however, did the testator attach a special value; for, while he contemplated a possible sale of the house and other articles, he was desirous that the books should remain in his family. He does not, however, seek to carry out this desire by the creation of successive estates. After the gift to the eldest son, the books slip out of the bequests that follow; and it is clear that he trusted, not to the skill of the conveyancer, but to a sense of filial duty, for the fulfilment of his wish. If then he gave his son complete control over the books which he was anxious to preserve, how can it be said that the same son took only a limited interest in the house, coupled with the books in one bequest, and distinguished from them only by being an object of less regard?

It is said, however, that the liberty to sell the house, coins, and pictures, would be surplusage, if the previous words had given the legatee the interest under the lease. There might be some weight in this argument if there had been no further gift, although even then I would think that the words were more the admonitory suggestions of a father to a son than the creation of a legal power; but, even in the latter sense, they are explained by the executory devise to the second son in the event of the eldest son dying without having a family. This gift over would have prevented John Robert Boyd from making good title to a purchaser during his lifetime, were it not for the special power or liberty to sell conferred upon him. But, as I have already pointed out, the key to the construction of what goes before is to be found in the reference to the death of the eldest son without

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having a family. In that event, and in that event alone, the will disposes expressly of the property. But men of position do not usually regard their eldest sons as doomed to celibacy or sterility. That John Boyd did not anticipate this is shown by the reference, in other parts of the will, to the issue lawfully begotten of John Robert Boyd. What he contemplated was that if, as was probable, his eldest son would marry, and have children, the house having been devised to him, and there, in that case, being no clause to take it away from him, it would pass on his death to his devisee or heir-at-law, as the case might be. Let there be struck out from the bequest the liberty to sell, and the words, "before he shall have sold," and can there be a doubt as to what the true construction then would be? No one, I think, could hesitate to hold that it was the ordinary case of a devise in quasi fee, with an executory gift over, to which the law would give effect. The introduction of the provisions as to sale may, no doubt, for technical reasons, defeat the executory gift; but this consequence, unforeseen by the testator, ought not to affect the construction of the document so far as it relates to the quantity of the estate taken under it.

For these reasons I am of opinion that the whole of the leasehold interest was given to John Robert Boyd, subject, no doubt, in the view of the testator, to its passing over to William Boyd, in case the former died without having a family, and before he sold the house. Why then, it may be asked, as these events happened, is not effect to be given to the plainly expressed intention? Well, the only reason is a rule of law, the result of repeated decisions of our Courts. If it had pleased our judicial law-makers, in times past, to have held otherwise, I, for one, should have been perfectly satisfied, and society would have been none the worse. But, if we are now to disregard the venerable authority of *Gulliver* v. *Vaux* (1), brought to light in 1856, after a century's repose, in Serjeant's Hill's manuscript:—

> "'Twill be recorded for a precedent,
> And many an error, by the same example,
> Will rush into the State."

It will be observed that I assume, if the defendant fails as to

(1) 8 D. M. & G. 167 note.

the life estate, that *Gulliver* v. *Vaux* (1), *Holmes* v. *Godson* (2), and the other decisions quoted in *Shaw* v. *Ford* (3), govern the present case. I do so because this was expressly admitted by Mr. Matheson, who does not usually embarrass himself by admissions. No doubt some points of distinction might be suggested. The principle underlying these authorities seems to be that there is a repugnancy between the executory gift and the power of disposition, which, according to the language of the will, may be exercised by the first taker down to the very time when it is contemplated that the executory gift will take effect.

Mr. Justice Fry, in *Shaw* v. *Ford* (3), seems to doubt the logical sufficiency of this reasoning; and it is not easy to see the repugnancy in a case like the present where the only power of disposition is a sale for money or money's worth, and does not extend to a gift *inter vivos* or by will. Still, the general proposition, if illogical, is intelligible, and Courts of law will be unwilling to limit its operation by refined distinctions. I am sure therefore that counsel for the defendant have yielded nothing that they could have hoped to maintain.

Having thus decided that John Robert Boyd was the absolute owner of the leasehold premises, and consequently that they were included in the gift in his will of all his landed property to the defendant, I have not much more to say. There is indeed another point, but it can easily be disposed of. The defendant, while accepting large benefits under the devise quoted, has disclaimed the house in St. Stephen's-green. The plaintiffs' counsel argue that he is not at liberty to do this; and they have quoted several cases in which it has been held that where properties of different kinds are embraced in the same testamentary gift, the devisee who accepts the portion that is beneficial cannot repudiate what is onerous. It is unnecessary for me to examine these cases, as their authority has not been questioned, and it is not seriously denied that as between the defendant and other persons claiming under the testator, they would be applicable to the devise in question. The contrary has not been argued, and I presume counsel considered it unarguable. They have, however, adopted a suggestion for which I fear I am myself responsible, that the equities

(1) 8 D. M. & G. 167 note. (2) *Ibid.* 152. (3) 7 Ch. D. 669.

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existing between the several persons interested in the assets of the testator cannot be made use of by the plaintiff for the purpose of making the defendant their tenant against his will. There is no authority on the point, and the distinction cannot be sustained on any principle known to me. If the heir-at-law, administratrix, and legatees, can force on the defendant the burden of the lease, it is because, notwithstanding his efforts to the contrary, the leasehold premises are vested in him; and, if this be so, what is there in law or reason to prevent the lessors from proceeding against him directly? If it is admitted that his disclaimer is valueless to free him ultimately from the obligation, there is no ground for holding that he can rely upon it as an answer to those to whom the obligation is due.

For these reasons I am of opinion that the plaintiffs are entitled to judgment.

JOHNSON, J.:—

The defendant is sued for arrears of rent as assignee of two leases, 1826 and 1833, of a house in Stephen's-green, each for the same three lives, one of which still survives, made by the plaintiffs' predecessors in title to John Boyd, his heirs and assigns, at yearly rents amounting in all to £110 15*s.* 6*d.* present currency. The plaintiff's title is not disputed. The question for decision is the liability of the defendant, whom the plaintiffs contend is devisee of John Robert Boyd to whom John Boyd absolutely devised all his interest in the house. The learned Judge before whom the action was tried reports that it was contended before him, first, that under the will of John Boyd, his son John Robert Boyd was tenant for life only with power of sale, or, secondly, devisee, subject to an executory devise which took effect. The argument here has been the same, and therefore it was contended for the defendant that John Boyd's interest in the leases of 1826 and 1833 did not vest absolutely in John Robert Boyd, and did not pass by his will to the defendant. In the alternative the defendant contends that if the interest in these leases did pass under the devise in the will of John Robert Boyd it was disclaimed by the defendant.

When John Boyd made his will, and at his death, he was the

owner of considerable landed property of various tenures besides this house. His family consisted of his wife, two sons and five daughters. His family residence was at Ballymacool, Co. Donegal, of which county he was treasurer; and it appears by his will that, in the disposition which he made of each part of his landed property, he had throughout in his mind all his children as successive objects of his bounty. This will was made before 1838, and is to be construed as the law stood before the Wills Act. By it he provides for his wife an immediate sum of money for the support and maintenance (in his own words) "*of herself and my family*"; and, after further provisions for her income, he gives her the house and demesne of Ballymacool during her life or widowhood, "intending it," as he says, "as a home and residence for *herself and my children*" (using the words family and children apparently in the same sense), and for that purpose he bequeaths to her the furniture there, to be used as it was used during his own life, so long as she continued his widow, and "thinks proper to make it her residence." Then he provides portions for his daughters; and, subject to his widow's interest in Ballymacool, he proceeds to dispose of his lands and houses. He gives the house, demesne, and lands of Ballymacool and other lands to his eldest son John Robert Boyd, and his issue; and if he dies without issue, to his second son William Boyd, and his issue; and if he dies without issue, then over to his daughters. In like manner he gives other lands to his second son William, and his issue; and if he dies without issue, to his eldest son and his issue; and, if he dies without issue, over to his daughters. He then proceeds to dispose of this house in Stephen's-green—on which the question in the present case, which is one of difficulty, arises—and its contents, using for that purpose ordinary popular and untechnical words which are to be construed according to the ordinary use and common acceptation of the English language, to ascertain his intention as he has himself expressed it in the words of his will; and it is the duty of every Court, as I understand it, to carry the testator's intention so ascertained into effect in so far as it does not conflict with any *rule of law* as contradistinguished from a *rule of construction*. A rule of construction is overcome by evidence of a testator's intention to the contrary; a rule of law operates in

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defiance of and defeats the testator's intention, however clear it may be to the contrary. Lord Justice Fry puts this plainly in *Re Coward* (1). "In my opinion," he says, "rules of construction and rules of law differ very broadly in this point of view: that one is a rule which points out what a Court shall do in the absence of express or implied intention to the contrary; the other is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary. It is therefore in defiance of the intention of the testator." In my opinion, when the Court is satisfied by the words of the will what the testator's intention is, that intention, and not a mere rule of construction, is the guide which the Court is to follow in construing the will.

The words in which the testator disposes of his house and its contents are these:—"I give and bequeath to my eldest son John Robert Boyd, my house in Stephen's-green with all the furniture therein (excepting such articles as my wife may select to take to Ballymacool), my pictures, books, prints, books of prints, coins, wine, and everything contained therein except plate and linen" (of which the testator made a subsequent gift) "he paying the rent thereof." It is contended for the plaintiffs that this is in terms an absolute gift to John Robert Boyd. I feel a difficulty in following how that is made out. Before the Wills Act, as a general rule of construction, where there was no intention of the testator to the contrary, a devise without words of limitation of lands or hereditaments which were held by the testator in fee-simple, or to him and his heirs *pur autre vie* (*Doe* v. *Robinson* (2)), passed to the devisee an estate for his own life only. If the testator, by the words which he used, showed his intention to pass his entire interest in the subject-matter of his gift, then, whether it was fee-simple or *pur autre vie* his intention prevailed over the general rule of construction, and the entire interest passed, because the testator had, by the words which he had used, expressed his intention to give his entire interest. So as to acts of alienation *inter vivos* of estates *pur autre vie*, in *M'Clintock* v. *Irvine* (3), Lord Chancellor Brady says: "It is not necessary to have words of inheritance if by other words the intention to pass the whole estate

(1) 57 L. T. (N. S.), C. A. 285, 291. (2) 8 B. & C. 296. (3) 10 Ir. Ch. R. 480.

of the grantor be indicated"; and this was followed in *Brennan* v. *Boyne* (1). That "the analogy of a fee-simple estate is to be applied so far as it can be applied both as to the capacity and the incapacity of alienation of an estate *pur autre vie*," is the opinion of that eminent lawyer, Lord Justice Fry, in *Re Barber's Settled Estates* (2). After discussing this branch of the law in its general principles, and, in accordance with the opinion of Lord St. Leonards in *Allen* v. *Allen* (3) on this principle, it was held that a prior devisee in quasi-fee of an estate *pur autre vie* could not defeat an executory devise of the same lands: *Barber's Settled Estates* (2). In this gift there is nothing to show any intention of the testator to give his entire interest in this house to his eldest son; he describes the house locally, without words of inheritance, and without, in this the operative part of the gift, any word denoting property or indicating an intention to pass his entire interest in the house; nor, in my opinion, is such intention shown by the gift of "everything contained" in the house, which is not a separate or independent gift, but, by the word "with," is linked to the gift of the house as accessorial to it. Even if it had been otherwise, and if in a similar context the contents of the house had been given as a gift separate from and independent of the house, we were not referred to any authority—and I am not prepared to decide in the absence of authority—that a devise of the house in the terms of this will would by an absolute gift of its contents be enlarged to a devise of the entire interest *pur autre vie* in the house. Such an argument does not seem to me to have found favour in *Hill* v. *Brown* (4). Therefore I think no intention appears in this part of the gift to take the case out of the general rule that a devise without words of limitation of land, or house, held by the testator to him and his heirs *pur autre vie*, before the Wills Act, passed only an estate for the life of the devisee. The general rule of construction and the testator's intention coalesce.

But, even if this was not, as I think it was, a gift for the life of John Robert Boyd only, still at most it was an indefinite gift, and then the testator proceeds to deal with the house and its contents by a further and substantive provision, on the basis, as it

(1) 16 Ir. Ch. R. 87, 101.
(2) 18 Ch. D. 624, 628.
(3) 2 Dr. & War. 307, 327.
(4) [1894] App. Cas. 125.

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appears to me, that he had not previously made, and did not intend to make, an absolute gift of the house and its contents, or either of them, to his son, "And in case that my said son John Robert shall not *think proper*"—words similar to those used in the gift of the family residence and furniture to his widow—"to occupy"—a word denoting possession, not property—"or keep"—also a word of possession, not necessarily of property; and, even if it did denote property, not used in the operative part of the devise (1)—"my said house, he may be at liberty to sell the same together with, if he thinks proper, my pictures, coins, &c."—this "*et cetera*" making the subject of this provision co-extensive with the former "everything contained therein," and then, after expressing a wish, inoperative to limit this provision, that his books should not be sold he proceeds—"the amount of the sale to be applied to his own use and benefit"—words showing that, when the testator intended to make an absolute gift, he knew how to express his intention to do so; and then follow the gifts over. It is, as I collect, argued for the plaintiffs, that, looking at the commencing words of the gift and of this subsequent provision for sale, the testator expresses his intention to give this house and its contents to his eldest son absolutely, and that the words "he may be at liberty to sell," were not intended to give a power of sale, and are not apt words to create a power of sale, but merely emphasize, needlessly it may be, the uncontrolled dominion which the testator intended his son to have over the whole subject of the gift "for his own use and benefit"; and therefore it is said the gifts over fail because the rule is that when an absolute estate is given to a person by will in real or personal property, or both, any attempt to limit the exercise of the rights which the law attaches to absolute ownership is contradictory to the prior gift, and repugnant to it and void, and that any declaration that he may exercise those rights is useless and inofficious. This, however, is a rule of construction, and its operation depends on the testator's intention and the terms of the particular will. Even in the strictest technical law, every gift in defeasance or modification of a prior gift is not therefore necessarily repugnant to or contradictory of the prior gift. By shifting use or executory devise a prior gift may by skilful conveyancers be defeated or modified,

(1) [1894] App. Cas. 125.

and probably the commonest form of executory devise is that which defeats a previous devise in fee. This contention also takes it for granted that the prior gift of the house and its contents to his eldest son was an absolute gift. In support of this argument for the plaintiffs, the Court was pressed with the authority of *Holmes* v. *Godson* (1) and *Gulliver* v. *Vaux* (2). In each of those cases there was an absolute devise in fee-simple with a devise over to other persons if the prior devisee should die intestate, and the devise over was held void. The ground of that decision is explained by Lord Justice Turner in his judgment, viz.: that the devise over in the event of the devisee dying intestate was repugnant and void, because it "tended directly to contravene the law founded on principles of public policy which," the Lord Justice says, "has said that in the event of an owner in fee dying intestate, the estate shall go to his heir"; and that a similar principle applies to personal property. In those cases the testator's intention, as explained by the Court, violated a settled rule of law, which necessarily operated in defiance of the testator's intention and defeated it. In the present case there is no devise over on intestacy of the previous taker, and it appears to me, therefore, that neither the facts of these cases nor the rule of law involved in their decision, nor *Shaw* v. *Ford* (3), apply to the present case.

Another authority, much relied upon by the plaintiffs' counsel, was *Mortlock's Trusts* (4), where a testatrix gave one-fifth of a sum of money to two persons, "in equal parts each for his and her sole use and benefit, and to be disposed of as each of them pleases at their death, and if not so disposed of" over. There the prior gift of the money was as absolute as words could make it, and the gift over was on the intestacy of the legatee to whom the prior gift had been made absolutely in most unlimited terms; it was, therefore, held there that "words sounding like a power" which followed, and purported to limit the legal incidents of absolute ownership, were inconsistent with the gift, and therefore void. In these, and other cases which were cited, the groundwork of decision was that the prior gift was in terms absolute, and that being the case the question arose whether by his

(1) 8 D. M. & G. 152.
(2) *Ibid.* 167 note.
(3) 7 Ch. D. 669.
(4) 3 K. & J. 456.

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subsequent words the testator had indicated an intention either (*a*) to cut down, or (*b*) control, the absolute nature of his prior gift. In the former case his intention would prevail; in the latter the rule of law would defeat his intention, however clearly expressed. In *Re Coward* (1), on the construction even of a will governed by the Wills Act, it was held that, although words in the earlier part of the will appeared to give an absolute interest in real and personal property, yet the testator had, by the subsequent provisions of his will, expressed his intention that his earlier gift was absolute as to part only, and for life as to the rest of the property comprised in it, and that his intention must prevail over any rule of construction. Lord Justice Cotton says: "Undoubtedly where an absolute estate is given to a person whether in realty or in personalty, any attempt to deprive that person of the right of dealing with it is inofficious, inoperative, and useless. But, in my opinion, this rule is only a rule of construction—not a compound rule of construction, but a rule of construction which must be dealt with, with reference to the other provisions and expressions contained in the will. Being a rule of construction it is to be followed only when the testator has not expressed his own intention—has not given any other guide to the Court which has to consider his will." Lords Justices Bowen and Fry express themselves to the same effect. This affords a salutary guide to follow: and, therefore, even if the gift of this house is in the commencement indefinite, and not, as I think it is, only for life, still regard must be had to the other words and provisions of the will. The argument of the plaintiffs' counsel takes for granted that this gift is in its commencement an absolute gift to the testator's eldest son; then fastens on that; applies to it the rule of construction on which they rely; disregards all the subsequent provisions of the will, and treats them as inofficious and repugnant to an absolute gift, and void, irrespective of the testator's intention. Lord Justice Cotton, however, points out that this rule of construction must be dealt with with reference to the other provisions and expressions contained in the will, and, as Lord Justice Bowen puts it, "the rule of construction disappears at once if a contrary intention

(1) 57 L. T. (N. S.), C. A. 285.

appears" (1). The argument that the words "he may be at liberty to sell" are not apt words to create a power, and are only "words sounding like a power," as in *Mortlock's Trusts* (2) is not, I think, well founded. No precise form of words is necessary to create a power; any words, however informal, which clearly indicate the intention to give or reserve a power, are sufficient for the purpose: see Sugden on Powers, ed. 1836, p. 116; 8th ed., p. 102. There is a distinction in the form, but there is no difference in the substance and force of the expression, whether you tell a person he has liberty to do an act, or has authority or power to do it. The intention conveyed by either form of expression is the same, and the result is the same in effect. The testator, in the earlier part of his will, had provided that his eldest son was not to succeed to the possession of the family residence so long as the widow thought proper to make it her residence; and he now provides a furnished residence, immediately on his death, for his eldest son, if he thought proper to occupy it; if it did not suit his arrangements to occupy it at once or to retain it for his occupation, he authorized him, by act during his lifetime, to turn it into money for his own use, as, if he had succeeded to the possession of the family mansion or had children, he might wish to do; and if his eldest son did not act on this authority, and died without (as the fact was) having a family, he does not give him a testamentary power of disposition over it, but goes on to deal with it by his own will, and to provide for his other children successively, as he had previously done in the earlier gifts, and makes an executory gift in the same manner to his second son, and if he does not act on the authority to sell, and dies without having a family, the testator makes a further executory gift for the benefit of his daughters then living. In the earlier part of his will he had used the word "family" as meaning "children," and, I think, he here uses it in the same, its primary, sense: see *Re Muffett* (3), following *Pigg* v. *Clarke* (4). I also think that throughout this gift the context shows that the testator is dealing with the same subject-matter—the house with its contents—although he describes the contents by different

(1) 57 L. T. (N. S.), C. A. p. 289.
(2) 3 K. & J. 456.
(3) 55 L. T. (N. S.), 671.
(4) 3 C. D. 672.

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and more compendious forms of expression, as the constant repetition becomes tedious in the different parts of his gift. He commences elaborately by giving "all the furniture therein," followed by a specific enumeration of articles, and concluding with everything therein contained except "plate and linen." In the next part of the gift in reference to sale, he says "to sell the same" (the house) "together with, if he thinks proper, my pictures, coins, wine, &c."—a more compendious form of expression. Next he says, "before he shall have sold my said house"—a still more compendious form of expressing the whole subject-matter of the provision for sale. Then, in the gift over to the second son, he also used the word "house," alone; and, in the further gift over, he directs the sale of his "house, pictures, and coins." The present case is in principle not unlike that of *Re Thompson's Estate* (1), although, in that case, the gift commenced in terms with an express life-estate. If the testator intended to give the house and its contents to his eldest son absolutely, it was an idle waste of words to tell him he was free to exercise the most common act of ownership, and sell it during his lifetime; and the subsequent limitations, which the testator was at so much pains to make, are mere idle show. But, if his intention was to give his eldest son a life-interest only, with power to sell the house during his life, not to dispose of it by will, and if he did not do so, and died without a child, then that his second son should have the house and its contents for a similar interest and in like manner, with an ultimate gift over for the benefit of his daughters, providing in this, as in the earlier gifts of his will, for all his children as successive objects of his bounty, then he has expressed his intention very intelligibly. The plaintiffs' contention expunges from the will the entire of the gift, except what is comprised in the earlier part, which it construes as an absolute gift without regard to the other provisions and expressions of the testator in his will. The defendant's contention rejects no part of the gift, but gives effect to every word which the testator has used in it, from beginning to end, to express his intention.

(1) 14 Ch. D. (C. A.) 263.

It was also argued for the plaintiffs that, unless the plaintiffs' construction is adopted, viz. that John Robert Boyd took the house absolutely, then it was undisposed of if he did not sell it in his lifetime and died having a child, because there was no gift in that event. I think, however, that, if the testator expressed his intention—even though he overlooked the contingency, which did not in fact occur—that is no reason why the intention he has expressed should not be carried into effect, so far as it is expressed, or why his intention should be sacrificed to the symmetry of a rule of construction. And, even if the suggested contingency had happened, the words of the residuary gift to the testator's two sons—notwithstanding he calls them "residuary legatees"—are wide enough to embrace the house if not otherwise disposed of; so that in no event would there have been an intestacy in respect of it.

Therefore, though the construction of this will is by no means free from doubt, yet I think the testator has expressed his intention to give John Robert Boyd an estate for his own life only, with power of sale for his own benefit in his lifetime, and without any testamentary power of disposition; and therefore that, in the events which have happened, the defendant is not assignee of these leases, and is not liable for the rent now sued for which accrued after the death of John Robert Boyd.

As to the alternative defence, founded on the assumption that John Robert Boyd was the devisee of all the estate and interest of John Boyd, in the view I take of the main point, it is not necessary to decide this alternative defence; but the principle is, I think, distinctly laid down by Lord Justice Cotton in *Re Hotchkys* (1) at page 417. If the leases of 1826 and 1833 vested absolutely in John Robert Boyd, they passed to the defendant by his devise of "all his landed property." By assuming the name and arms of Boyd, in compliance with the terms of the devise, the defendant accepted the devise in its entirety as it was made. After that he could not disclaim any part of it, and even if his disclaimer had preceded the assumption of the Boyd name and arms, still I think that the devise, being of an aggregate of landed property, the

(1) 32 Ch. D. 408.

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defendant could not pick and choose, but was bound to accept or refuse the entire.

I therefore think that judgment should be entered for the defendant.

O'BRIEN, J.:—

The question in this case is whether the defendant fills the character of assignee of the lessee's interest under a lease for lives so as to be liable to arrears of rent, and arises upon the will of John Boyd dated in the year 1833. [His Lordship referred to the provisions of the will of John Boyd, and continued:—] The testator appears to have been a member of the legal profession, but also to have been the County Treasurer of Donegal, from which it may be assumed he did not practise; and an argument, used, from the facts of the will, to show that he understood the proper technical use of legal terms cannot be entirely relied on; for though he has given estates expressly for life, he has, in some other respects, made an unskilful use of legal language, as, for instance, by applying the same terms of limitation to freehold and chattel interests. Some few indications, however, are capable of being obtained by comparison from the will, which would not be without bearing on the clause in dispute. For instance, he gives his residence in the country, held under a Bishop's lease, to his wife expressly for her life, and if she should not think proper to reside there, then over; whereas in the clause we have to deal with the devisee is entitled to sell the property and keep the proceeds, and there is no gift over unless in the event of his not doing so. So also the direction to pay the rent which is found in the gift of the house, is also attached to the gift, unquestionably absolute, of the lands held under the Bishop's lease. Now, it is settled of course that words of limitation are not required even in a deed to pass the whole interest in an estate *pur autre vie*. That rule was qualified in *Brenan* v. *Boyne* (1) by the Court of Appeal, to the extent that a grant in general terms of such an estate will not alone have that effect without the evidence of intention. In other words, the rule was considered to be negative, not affirmative—

(1) 16 Ir. Ch. R. 87.

that words of limitation are not necessary, but that the whole interest may pass without such words, but will not necessarily pass—that the want of such words, so to speak, will not be a bar—that the law ascribes no effect to their absence, and leaves the matter still upon the general evidence of intention. That was a decision concerning a deed, but I do not know of any decision in which the same qualification has been applied to the case of a will, whether or not such an extension of the doctrine would affect the instance we have to deal with against the principle on which wills are more generally governed by intention. The evidence of actual intention, however, is considered to be afforded, in the present case, not only by the contingency on which the estate is limited over, but also by the clause concerning the sale of the house, which, it is said, is inconsistent with the existence of a mere life estate. As frequently happens, this argument has another face, which is turned quite away from the absolute interest, because, what reason, it is said, could there be for giving the right to sell to a person who had the right already if the whole estate passed. In this conflict we have to look, outside the clause which refers to sale to the context of the whole will for the proof of intention, not to other decided cases, which are now generally considered to be of little use, and described in the case referred to by one of my colleagues as that of interpreting one man's nonsense by another man's nonsense.

Three different constructions of this will were presented in the argument: first, that there was a life-estate, with a power merely of sale attached to it; secondly, that there was a life-estate, followed by a gift by implication to children of John Robert, resulting from the clause, "if he shall die without having a family," either of which views would answer the defendant, in the consequence that the estate of John Robert expired, or passed away from him, by the gift over; thirdly, as contended by the plaintiffs, that there was an absolute devise of the house, which was not turned aside into the limitation over, as that was void for the repugnancy of the condition, but went on through the first taker by his will to the defendant. Perhaps these do not exhaust the whole category of constructions, and that another is capable of being suggested, in the view that the character of the

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limitations may be wrongly assigned to the testator's expectation of what would happen in a usual course of personal convenience, or to what was an expression of the testator's wish, as distinguished from an actual limitation of estate.

Now, any ordinary person looking at this will from the testator's point of view and in the situation of his family, apart from the effect of legal rules, would have little doubt what was the object that was in his mind. He had sons and daughters, an estate and residence in the country, and a house in town. His eldest son, to whom the house in the country was devised, subject to a life-estate in the wife, was also to have the town-house and certain chattels in it. If he did not care to live in or keep it, he was at liberty to sell it, and keep the money. If he had a family, at his death the house was undoubtedly to remain with them. This results most certainly from the fact that the gift over was limited on the event of his having no family, and still further appears from the direction that part of the chattels was to remain with the family. If the other event happened, that there was no family, the house was to go to the second son, with the like provisions, and after him to the daughters absolutely. That being the manifest scheme on the face of the will, one would look for a course of construction that would carry it out, and not divert it from its objects. But the difficulty is that the mode, which the testator adopted, of giving effect to his object, it is contended, comes in conflict with the rules of law; for, while he might have secured the succession of the sons by giving a life-estate successively, he has given an absolute interest to the first; and, while that would not prevent a gift over by way of executory devise, he has made that gift depend on the event of his not having disposed of the property in his lifetime, thus excluding the right inherent in property to dispose of it by will. Such a gift over, on the authority, too often recognized to be now shaken, of *Gulliver* v. *Vaux* (1), and *Holmes* v. *Godson* (2), is repugnant to the estate already given, and void. We have, therefore, first to see, as the foundation of the dispute, what was the estate John Robert took, a life-estate or the absolute interest.

Mr. Ball has used an argument that carries us back to the

(1) 8 D. M. & G. 167 note. (2) *Ibid.* 152.

law of contingent remainders, which now survive for very few cases, and which is not affected by the statute, 8 & 9 Vict., because that was subsequent to this will, and, while turning future into executory gifts, had no application to existing instruments, as this was, except to prevent the remainder being defeated by certain specified contingencies, and of which law it was an invariable rule, that what could take effect as a contingent remainder should never be construed as an executory devise; and he contended that the argument for the defendant results at most in the conclusion that this was a case of a contingent remainder. I do not see, however, how this objection, if well founded, would establish the plaintiffs' right to the full extent. For, if it were the case of a contingent remainder that failed, it would fall into the gift of the residue, which would make the defendant liable to but one half the rent. I do not know of any case of a contingent remainder where the extinction of the preceding estate of freehold entered into the contingency; but supposing the other contingency of his not having a family could be applied to the assumed continuance of the preceding estate. Of course all this goes upon the foundation that the first estate was for life merely, which it could not be consistently with the clause that he might sell and keep the proceeds, unless this was to be considered merely as a power; and, as an instance, where such a state of things was held to exist, where there was a life-estate and a power to acquire the whole interest, *Pennock* v. *Pennock* (1), and *In re Stringer's Estate* (2), were chiefly relied upon. Now in *Pennock* v. *Pennock* (1) there were several conditions which seem to render it nothing less than impossible to apply it to the present case. There was an express gift for life in terms, with a power to appoint absolutely, and the further interest was given, also expressly, by way of power. This is the case of an estate capable of passing absolutely by general words, and the word "power" is nowhere used. We must distinguish between the question whether the two things are inconsistent in law, and the question whether they do exist as a matter of construction. The words "that he shall be at liberty to sell," it is contended, mean the same thing as a gift of a power. But the liberty is consistent

(1) L. R. 13 Eq. 144. (2) 6 Ch. D. 1.

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with the object, not of enlarging the life-estate into an absolute interest, but of displacing altogether the limitations over, to which otherwise they would be subject. The other case, *In re Stringer's Estate* (1), will be found distinguishable from the present, on the ground that, while the Court of Appeal considered the words, in ordinary cases, would amount to an absolute gift, they adopted the construction of a life-estate merely and a power attached, in order to give effect to the contingency, which they thought the will showed was in the testator's mind of the death of the devisee in the testator's lifetime, thus avoiding the objection of repugnancy in the gift over. Here there is no colour for attributing to the testator such an idea.

Then, how are we to deal with the words, "if he shall die without a family before he shall have sold the house"? What was to happen if he had a family? The lease would not go over in that case. What was to become of it? Mr. Matheson contended that there was a gift by implication in that event. To whom? It must be to the children if at all. But no authority was cited that children would take under the name of "family," and yet it is certain that it was not to go away unless he had no children. And if it were to stop in them, it must stop in the original extent, the absolute interest. Why should preference be given to the construction of a life-estate, when the other construction so completely fits into the limitations and the situation of the testator as to his family? Having thus, if they be right, got the estate into the eldest son, the plaintiffs have to keep it in him, and they profess to do this, and to carry it on through his will to the defendant by avoiding the gift over on the ground of the repugnancy of one branch of the condition to the estate as excluding the power of disposition by will, for which the cases of *Gulliver* v. *Vaux* (2) and *Holmes* v. *Godson* (3) were principally relied on. It is perhaps not obvious to ordinary understanding how that could be considered an illegal condition which is capable of being understood merely as a reference by way of description to the continued existence of the subject-matter of the gift over; and further it is a novel situation, in which the landlord takes upon him to determine the validity of the gift over as between the person in possession and the person

(1) 6 Ch. D. 1. (2) 8 D. M. & G. 167. (3) *Ibid.*, 152.

taking under the gift. However the doctrine was established in *Gulliver* v. *Vaux* (1) and followed in *Holmes* v. *Godson* (2) and is based presumably on the ground that the words that create the repugnancy, however they came to be used, enter into and become part of the condition of the gift of the house, and cannot be detached from it, and the principle of the decision was assented to in *Re Stringer's Estate* (3) in the argument in which *Holmes* v. *Godson* (2) was cited; and these cases were considered to overrule *Doe* v. *Glover* (4), and others in which a contrary view prevailed. Counsel argued that the words, "if he shall die without a family" before having disposed of the house, "did not necessarily exclude a disposition *eo instanti* of the death. However the clause that he was to be at liberty to sell, if he did not wish to keep or occupy, showed that it was a sale in his lifetime and not a disposition after death that was meant. And as to the other point, the landlord must look for the assignee of the tenancy somewhere, and he has no other course but to follow the estate in the line where it has gone by the rules of law, unless it be that by reason of no one insisting on the gift over, or resisting it, he is reduced to ejectment for non-payment of rent as the only remedy. Possibly no such case has ever occurred. However, if the repugnancy makes the limitation absolutely void, the case seems to be the same as if there was no clause of gift over at all, so that the lessor would be entitled to consider the estate simply as being vested in the devisee, and to be transmissible in the ordinary way. There are many instances in which the owner of the reversion must take upon himself the burthen and risk of determining who is the assignee of the tenancy. John Robert having died and made a will in general terms, leaving all his estate to the defendant, he entered into the possession of the rest of the property devised to him, and was advised to execute a deed of disclaimer as to the premises in Stephen's-green, the effect of which, it is contended, was to free him from responsibility. On the other hand it was insisted that he could not take this course, that it was a rule of property that he could not pick and choose and measure, that he could not take the part of the estate which was profitable and relinquish that which was burdensome, but must take all or none, and that taking possession by him of any part of

(1) 8 D. M. & G. 167. (2) *Ibid.*, 152. (3) 6 Ch. D. 1. (4) 1 C. B. 448.

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the property was an act of election which could not be undone and on which the disclaimer could have no effect.

At first I was disposed to yield to the view that the consequence of the rule was confined to giving a right in equity to those who were interested in the assets of the lessee on which the burthen of the rent would otherwise fall, to insist that the devisee must give up the other property, not that he must keep any part—to deprive him of the rest, not to fix the tenancy in him. However, on consideration, I am satisfied that this is not the necessary result of the rule, and that the argument is well founded—that the act of his taking possession of any part of the property, under a gift general in its terms, was a definitive acceptance of the whole, from which he could not recede, and which could not be annulled by a disclaimer. For this a distinct authority appears to exist in the case of *Re Hotchkys* (1), to which Mr. Justice Johnson has referred me, in which, under a devise of property in the aggregate—not several specific gifts—it was held that if a person enters into possession of part of a property, he cannot take that part with the obligations thrown upon it and reject another part of what is one integral gift. And I consider it is our duty, in accordance with the principle of the Judicature Act, which has been applied in several cases, to hold that there is a direct remedy against the party upon the engagements of that part of the property which he is thus compelled to assume, and that the plaintiffs are not obliged to seek another form of remedy, which, in the position of the defendant as to the property, the latter is so conscious would return upon himself as not to suggest that proceeding.

Upon the whole, notwithstanding the difficulties at each stage through which the result is attained, I have come to the conclusion that the plaintiffs have successfully made their way to the right claimed, that John Robert Boyd took the whole interest in the lease, and not simply a life-estate, that the gift over was void from the repugnancy of the condition, that the interest of the lessee went by his will to the defendant and was not taken out of him by the disclaimer, that a remedy exists against him directly, that he is therefore in law assignee of the tenancy, and liable to the arrears:—and I cannot reconcile it to my ideas of right, or the

(1) 32 Ch. D. 408.

just function of law to send the owner of the property upon a wild goose chase in pursuit of some other tenant—the alleged holder under the repugnant condition, whose repugnancy to the gift has hitherto retained him in safe seclusion.

In the result the decision of the majority of the Court is that the verdict entered for the defendant will be changed, and judgment entered for the amount due.

A. E. R. J.

Appeal. Feb. 27, 28. April 28.

The defendant appealed to the Court of Appeal (1).

Matheson, Q.C., and *Brunskill*, for the appellant:—

On the construction of the will of John Boyd, there are three possible constructions—1, that the effect of the devise was to give John Boyd a life-estate with a power of sale; if not, we contend 2, the effect of the devise is to give an estate in fee with an executory devise over in the event of John Robert Boyd dying without issue; if not, we contend 3, that John Robert Boyd took an estate tail. This is a will before the Wills Act, and the property was held *pur autre vie*, and so it gave an estate for life only. There are two distinct lines of cases—1, where the estate is given to a devisee in terms absolute, with a gift over in the event of his not disposing of it; and, 2, where a testator gives an estate for life in express terms and superadds to that a power of disposition and a gift over in the event of that power not being exercised.

There is strong indication on the face of the will that the testator intended only to give a life-estate; conferring a power of sale is inconsistent with an absolute interest. There are only two difficulties in the way of holding it to be an estate for life—1, the amount to be realized by the sale is to be applied for the devisee's own use and benefit. But it is competent to acquire an absolute interest coupled with a life-estate. The second difficulty would arise if John Robert Boyd had died leaving a family. Either the testator overlooked that contingency, or there was an implied gift of the house to the family, or else it falls into the residue.

This cannot be an estate tail, because there is a power of sale

(1) Before LORD ASHBOURNE, C., and FITZGIBBON, BARRY, and WALKER, L.JJ.

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which is inconsistent with such an estate: *Bibbens* v. *Potter* (1). If the gift of the house was an absolute one in the first instance it was cut down afterwards: *Re Stringer* (2); *Pennock* v. *Pennock* (3); *Thompson's Estate* (4); *Coward* v. *Larkman* (5); *Constable* v. *Bull* (6); *Kinsella* v. *Caffrey* (7). *Doe* v. *Glover* (8) is a strong authority in favour of the appellant.

The defendant was entitled to disclaim where there was an express devise of the house, *Talbot* v. *Radnor* (9); *Guthrie* v. *Walrond* (10).

Serjeant Campion, Q.C., Houston, Q.C., and *W. P. Ball,* for the plaintiffs:—

This was an absolute estate in John Robert Boyd, and the gift over is repugnant: *Bradly* v. *Westcott* (11); Jarman on Wills, p. 1133; *Shaw* v. *Ford* (12); *Brenan* v. *Boyne* (13). Such cases as *Pennock* v. *Pennock* (3); *Re Stringer* (2); and *Thompson's Estate* (4) do not apply, because there was an express gift of a life-estate in those cases. *Doe* v. *Glover* (8) has been overruled: *Holmes* v. *Godson* (14), following the old authority of *Gulliver* v. *Vaux* (15).

The defendant cannot disclaim; a devisee can disclaim one portion of property specifically devised, but when the property is given in bulk, as it is here, the devisee cannot disclaim one portion out of the whole: *Re Hotchkys* (16).

April 28.

The judgment of the Court was delivered by

LORD ASHBOURNE, C.:—

This is an appeal from the Queen's Bench Division, holding the plaintiffs entitled to recover from the defendant certain arrears of rent under two leases, by which the house 75 Stephen's-green, was demised for lives, one of which was, at the date of the action, in being. As the burden of the rent and covenants is now serious and unprofitable, the tenant seeks to repudiate all liability, and

(1) 10 Ch. D. 733.
(2) 6 Ch. D. 1.
(3) L. R. 13 Eq. 144.
(4) 13 Ch. D. 144; 14 Ch. D. 263.
(5) 57 L. T. (N. S.) 285; *D. P.*, 60 L. T. (N. S.) 1.
(6) 3 De G. & Sm. 411.
(7) 11 Ir. Ch. R. 154.
(8) 1 C. B. 448.
(9) 3 M. & K. 252.
(10) 22 Ch. D. 573.
(11) 13 Ves. 452.
(12) 7 Ch. D. 669.
(13) 16 Ir. Ch. R. 87.
(14) 8 D. M. G. 152.
(15) *Ibid.* 167, note.
(16) 32 Ch. D. 408.

has endeavoured in every way to show that, no matter who else may be liable, he is not bound to satisfy the plaintiffs' claim.

The important question in the case turns upon the construction of John Boyd's will, which was executed before the Wills Act, and is drawn without skill or knowledge, though with occasional affectation of technical language.

The house in question is dealt with in the following paragraph of the will:—

"I give and bequeath to my eldest son John Robert Boyd my house in Stephen's-green, with all the furniture therein (excepting such articles as my wife may select to take to Ballymacool), my pictures, books, prints, books of prints, coins, wine, and everything contained therein, except plate and linen, he paying the rent thereof; and in case that my son John Robert shall not think proper to occupy or keep my said house, he may be at liberty to sell the same, together with, if he thinks proper, my pictures, coins, wines, &c., but it is my wish that my books should not be sold but remain in my family, the amount of the sale to be applied to his own use and benefit; and in case my eldest son John Robert should die without having a family before he shall have sold my said house, then and in that case I will and devise my said house in the same manner to my second son William Boyd; and in case he shall so die I desire that my house, pictures, and coins, may be sold, and the produce divided amongst my daughters then living. I give and devise to my wife during her life my plate and linen, to be used by her as hitherto, and upon her death I give all my plate and linen to my eldest son John Robert, and if he dies unmarried to my second son William, and if he dies unmarried to the eldest of my daughters who shall be married and have issue alive."

This is the main clause of the will to be canvassed, though the whole will must be examined, and some of its other clauses may be closely noted with advantage. The testator makes his two sons John Robert and William residuary legatees.

The first question is whether the devise of the house is for life, with a power of absolute disposition annexed, or a devise to John Robert in *quasi* fee. In order to determine whether the gift is in *quasi* fee, the whole clause must be considered, and we must

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ascertain whether, according to *Brenan* v. *Boyne* (1), there is an intention appearing to give the whole estate which the testator had. Several circumstances point to such an intention: (1) John Robert has liberty, if he thinks proper, to sell the house, and keep the proceeds as his own; (2) the house is not to pass away from John Robert if he has a child; and there is an intention shown to benefit the children, which cannot be carried into effect in the form of a gift to them, but may be effectuated indirectly by benefiting them through the father's estate, if he takes it; (3) upon the appellant's construction, if there was a child the house would fall into the residue, and devolve neither under the original gift or gift over. It is a mere accident that John Robert chances to be a residuary legatee. (4) There is a devise of "my house," with a bequest of chattels, in terms conferring as regards the chattels (with the possible exception of the books), an absolute interest.

The appellant admits that as a life estate is not expressly given we have not to apply a rule of law, but a rule of construction, but he contends that the true construction of the whole clause was to give a life estate, with a superadded power of absolute disposition, with a gift over if the power was not exercised. Strong reliance was placed on the cases of *Stringer's Estate* (2) and *Re Coward* (3). In the first of these cases there was a gift to John Stringer of real and personal estate in terms which, since the Wills Act, conferred an absolute estate, "with full power and authority for him to give, sell, and dispose thereof, or of any part thereof, to such person or persons, and for such purposes as he shall think fit," by deed or will, "but provided he shall not dispose of my said real and personal estate, or any part thereof, as aforesaid, then and not otherwise I do hereby give devise and bequeath my said real and personal estate, or such part or parts thereof as he shall not so dispose of, in manner following," and then followed gifts over. John Stringer died in the testator's lifetime. Sir George Jessel, M.R., held the gift over repugnant and void. The Court of Appeal reversed the decision, but on the very special language

(1) 16 Ir. Ch. R. 87.
(2) 6 Ch. D. 1.
(3) 57 L. T. (N. S.) 285; 60 L. T. (N. S.) 1.

of the will, holding that the only way to give effect to all the provisions in the will was to hold that the testator gave to his brother a life estate with a power of appointment and disposition over the real and personal estate, and with regard to the real and personal estate as to which there was no exercise of the power or disposition, the various provisions of the after part of the will were to take effect. The gift in the present case contains none of the special features found there.

It is essential for the appellant to make out an estate for life, because, as Sir William Grant well says, in *Bradly* v. *Westcott* (1): —"The distinction is perhaps slight, which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely with a power of disposition superadded by deed or will. But that distinction is perfectly established that in the latter case the property vests."

The case of *Pennock* v. *Pennock* (2) falls within the first branch of the observations of Sir William Grant, as an estate for life is there distinctly given. The other case mainly relied on by the appellant is *In re Coward* (3). The will there also was a very peculiar one and led to wide differences of opinion as to its true construction both in the House of Lords and in the Court below. It will thus be seen that the two cases on which the appellant most strongly relied are very special in their facts.

It certainly was in this case the intention of the testator that if there was not a sale by John Robert Boyd, the estate should go over, and that intention of his in my opinion equally exists whether the gift is of a life estate or of a *quasi* fee.

If the law would allow of the estate in *quasi* fee going over in the event of the right of sale not being exercised, it would be hard to give any valid reason for saying that such absolute interest was not here conferred by the will, but in such latter case the intention fails, not because it does not exist, but on account of a rule of law, which prevents it operating. I concur in the words of Holmes, J., in his judgment—"If it pleased our judicial law-makers in times past to have held otherwise, I for one should have been perfectly satisfied, and society would have been none the worse."

(1) 13 Ves. 453.
(2) L. R. 13 Eq. 143.
(3) 57 L. T. (N. S.) 57; in the House of Lords, 60 L. T. (N. S.) 1.

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From the considerations I have referred to, I have arrived at the conclusion on the construction of the will that there was an absolute estate in *quasi* fee given with a superadded power of disposition and that the case thus would fall within the principle of the decisions which hold that the gift over was repugnant. It was argued that there was a good executory devise over to William Boyd. The general rule is, however, well stated in Farwell on Powers (p. 64). "Where there is an absolute gift whether of realty or personalty, followed by words sounding like a power whether general or limited, with a gift over if it be not exercised the gift over is repugnant and void."

I think that this case is substantially governed by the decisions, so often referred to, in *Gulliver* v. *Vaux* (1) and *Holmes* v. *Godson* (2).

The case mainly relied on by the appellant was *Doe* v. *Glover* (3), but I do not think that that case can now be regarded as a binding authority after the decision of Turner, L.J., in 8 D. M. & G. 166, and the judgment of Fry, J., in *Shaw* v. *Ford* (4), and the current of authorities since.

I do not think it necessary to discuss the second question arising in the will, which I regard as entirely untenable. It was clearly not competent for the devisee here to pick and choose. He cannot reject one part, and accept the rest. The matter is really closed by authority.

In my opinion the judgment of the Queen's Bench was right, and the appeal should be dismissed with costs.

Solicitor for the plaintiffs: *A. M'Dermott.*
Solicitors for the defendant: *A. & J. Robinson.*

R. D. M.

(1) 8 D. M. & G. 167.
(2) *Ibid.* 152.
(3) 1 C. B. 448.
(4) 7 Ch. D. 674.

CUMMINS, LESSEE; ST. LEGER AND OTHERS, LESSORS (1).

Appeal.
1895.
March 6, 11.

Tenant of an undivided share of lands—"Parcel of land"—"Holding"—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 57—*Redemption of Rent Act* (54 & 55 *Vict. c.* 57), *s.* 1.

The lessee of an undivided share of land is not the occupier of a "holding" within the meaning of the Redemption of Rent (Ireland) Act, 1891. *Diss.* Walker, C.

Decision of the Irish Land Commission reversed.

CASE STATED by the Irish Land Commission.

By lease dated the 15th May, 1710, Thomas Broderick, Alan Broderick, and St. John Broderick demised to Richard Bettesworth the lands of Ballydulea, in the county of Cork, containing 145A. 1R. 38P. for the term of 999 years, at a yearly rent of £40.

The lessee's interest became vested, as to eight undivided ninth shares thereof, in Thomas Mannix Cummins, and as to the remaining one undivided ninth in the Rev. Wm. Henry Flemyng, as tenants in common.

By lease dated the 2nd April, 1878, the Rev. Wm. Henry Flemyng demised his one undivided ninth share to Thomas Mannix Cummins for the term of 830 years, at the yearly rent of £40.

The interest of the Rev. Wm. Henry Flemyng in the reversion became vested in Richard F. St. Leger, W. H. Maunsell, H. M. Maunsell, and H. H. F. Maunsell.

Since 1878 Thomas Mannix Cummins was in *bona fide* occupation of the whole of the premises demised by the lease of the 15th May, 1710.

On the 24th February, 1892, T. M. Cummins served an originating notice on Richard F. St. Leger, W. H. Maunsell, H. M. Maunsell, and H. H. F. Maunsell, as lessors, under the Redemption of Rent Act, 1891, to redeem the rent, or, in the

(1) Before WALKER, C., PORTER, M.R., and FITZGIBBON and BARRY, L.JJ.

Appeal. 1895. CUMMINS v. ST. LEGER.

alternative, to have a fair rent fixed, describing the lands as one undivided ninth of 145A. 1R. 38P. of the lands of Ballydulea, in the county of Cork, which were held under a lease dated the 2nd April, 1878, from the Rev. W. H. Flemyng to the said T. M. Cummins for the term of 830 years, at the rent of £40.

The lessors not having given the prescribed consent to the redemption of the said rent, the application to fix a fair rent came on to be heard before a Sub-Commission, and an order was made on the 25th July, 1893, fixing the fair rent at £22 2*s.* 6*d.* On appeal to the Land Commission this ruling was affirmed by order dated the 9th June, 1894.

F. Pollock Hamilton, for the lessors :—

The question turns on the meaning of "holding" in sect. 57 of the Land Law (Ireland) Act, 1881, where the definition "parcel of land" is introduced for the first time. That definition is different from the definition of "holding" in sect. 71 of the Act of 1870, and must signify a specified and defined portion or part, of which the area and boundary can be ascertained. Again, it must be exclusively occupied to bring it within the scope of the Land Act, otherwise numerous inconsistencies would arise. How could a tenant in such a case exercise his right of sale under sect. 1, or the landlord his right of pre-emption? Or how could the latter apply to have the specified value of the holding fixed? The jurisdiction of the Land Commission under the Act of 1881 being entirely new, must be exercised in strict conformity with the statutes which created it: *Hudson* v. *Tooth* (1). The Land Commission cannot supply a *casus omissus*, or apply the doctrine of *cy près*: *Re Vahy* (2). Moreover, from the report of the Sub-Commissioners, it appears that they treated the whole nine-ninths as the holding, fixed a fair rent on that area, and divided the result by nine. This they had no jurisdiction to do. This point has been already mooted in *Jackson* v. *M'Master* (3), but was not decided.

Ronan, Q.C., for Cummins :—

This is a tenancy in a holding, and the tenant is entitled to have

(1) 3 Q. B. D. 53. (2) [1894] 1 Ir. R. 300. (3) 28 Ir. L. T. R. 12.

a fair rent fixed. A tenant in common can serve a notice to quit: *Morony* v. *Morony* (1); he can bring an ejectment, and where a tenant in common makes a lease to another tenant in common he can bring an action of waste. Under sect. 12 of 3 & 4 Wm. 4, c. 27, the possession of one tenant in common is not the possession of the others for the purposes of the Statute of Limitations. The interest of the lessee in this share is therefore perfectly distinct from the others. Moreover, in conveyancing, "the parcels" is the technical term employed to describe the land which passes, whether it is an undivided interest or not. If the landlord is right in his contention the tenant cannot sell his interest—a right given to him by sect. 1. If this be so, it must follow that his right to compensation for improvements under the Act of 1870 would be swept away; but there is nothing in the Act of 1870 to exclude the tenant of an undivided moiety from compensation. The definition section of the Act of 1881 provides that words which are not defined in the Act of 1881, and which are defined in the Act of 1870, shall have the same meaning as in the latter, unless there is something repugnant, and the two Acts shall be construed together. Putting the definitions together, the tenancy of a tenant from year to year is an interest in a holding, and any person who is a tenant under the Act of 1870 must be a tenant under the Act of 1881. Section 17 of the Act of 1881 provides for rights of common, which the tenant may exercise along with others, such as pasture and turbary.

March 11.

WALKER, C.:—

By lease, dated the 15th May, 1710, the lands of Ballydulea, in the county of Cork, containing 145A. 1R. 38P. were demised for a term of 999 years to a lessee therein named. The interest in this lease became vested, as to eight-ninths, in Thomas Mannix Cummins, and as to one-ninth in the Rev. Wm. Henry Flemyng, as tenants in common.

By a lease dated the 2nd April, 1878, the Rev. Wm. Henry Flemyng demised to the said Thomas Mannix Cummins, the owner of the said eight-ninths, the one undivided ninth of the said lands

(1) I. R. 8 C. L. 174.

Appeal. 1895. CUMMINS v. ST. LEGER. Walker, C.

of Ballydulea, to hold for a term of 830 years at the yearly rent of £40, and thus, till the year 2700 or so, he became lessee of the one-ninth, and in fact is in occupation of the whole nine-ninths, as to the eight-ninths under the lease of 1710, and as to the one-ninth under the lease of the 2nd April, 1878; and he has served an originating notice under the Redemption of Rent Act to redeem his rent of £40, or, in the alternative, to have a fair rent fixed.

The case stated raises the question whether the Land Law Acts apply, so far, at all events, as regards the fair rent fixing provisions, to the tenancy of an undivided share in lands, not in their character excepted from the Acts. Inasmuch as my three colleagues are of opinion that the Act of 1881 does not apply to such a case, my opinion that the case is within the Act is of no practical importance, and is probably erroneous; but I shall shortly state the grounds on which that opinion rests.

For the purpose of the question, I think the case may be treated as if there had been a lease of this one-ninth, which had expired within the meaning of sect. 21 of the Act of 1881, or as if Mr. Flemyng had made a letting from year to year to a third person.

The difficulty in the case arises on the definition of the word "holding" in the Act of 1881, and the practical difficulty of applying the fair rent provisions to an undivided interest.

The first consideration I think is whether the case was within the benefits conferred on the tenant by the Act of 1870. I do not think the Act of 1860 helps. "Lands" in it include incorporeal hereditaments. The word "holding" runs through the sections of the Act of 1870. Coming to sect. 3, the term is used in that section, which awards compensation to tenants in the absence of custom. If there was a tenant from year to year of an undivided interest in lands, and he was disturbed by a notice to quit and subsequent ejectment, could he claim compensation for disturbance? As to its being based on valuation, an undivided owner has a valuation put on him. That difficulty would not arise under the substituted provision of sect. 6 of the Act of 1881, which makes rent the basis. Then there are the definitions in sections 70 and 71. [His Lordship read the definition of "tenant" in sect. 70.] The lessee here would plainly come within the defi-

nition of tenant. "Holding" is defined in sect. 71—"The term 'holding' shall include all land of the above character held by the same tenant of the same landlord for the same term, and under the same contract of tenancy." This, I think, means the agricultural or pastoral subject, held (from year to year, say) under the landlord. It would seem to me to be land held, though it is held in common with another or others. The consequences of including such a subject in the definition are a different consideration from whether it is included, though they are legitimate topics for consideration in the construction of the difficult or doubtful word. I agree that "holding" means the land which the tenant holds—the corporeal hereditament—which is the subject of his tenancy, and the practical difficulty of applying the rights reserved to landlords, and the exceptions from the Act, to undivided interests, is obvious. Rights of redemption, covenants against alienation, pasture lettings, may be mentioned; but they equally stand in the way of effective contract in relation to such a property. No man, even if he could do so, will execute improvements of a permanent character on the subject he holds in common, and therefore a case under sect. 4 of the Act of 1870 would not be likely to arise, unless there were a partition. Now, if the tenant's interest became held in ninths, would one of them execute improvements? And yet, all of them in that case would be conjunct tenants, as in *Ireland* v. *Landy* (1). I think, on the whole, a tenant in common, not otherwise excluded, would be within the Act of 1870.

Passing to the Act of 1881, we find the term "holding" used in sections 6 and 7, which amend the law as to compensation for disturbance. This brings in the subject "holding" from the Act of 1870, and as the acts are *in pari materia*, what is "holding" in one must be "holding" in the other—at all events, for all purposes with which the Act of 1870 is conversant; and it would seem to me for all, including sections 1, 6, and 7. Of course, the whole argument falls to the ground if the Act of 1870 does not apply. Section 8—the fair rent section—follows sections 6 and 7, and is supplemental in the sense of conferring benefits on a continuing tenant, as the others did on a quitting one. True, the

(1) 22 L. R. Ir. 403.

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rights reserved to a landlord of a statutory term under sect. 5 are difficult, and in many cases impracticable to work; but I think the difficulty arises more from the difficulty of enjoying them than the conferring of them in law. It would equally arise in the case of a contract *inter partes*, though such a contract would be legal. I think if an undivided interest is excluded, it must be by force of the definition of "holding" in sect. 57. [His Lordship read the definition.] This is substantially the same as the definition of holding in the English Agricultural Holdings Act. Every other branch of the compound definition fits in. He holds "land"; it is agricultural or pastoral; it was subsisting on the 22nd August, 1881; he holds it under a contract, and he also, I think, occupies it. But is the subject which he holds a "parcel of land"? Is it necessary that it should be owned in severalty to be such? I think not. I think, as we have the 145 acres of Ballydulea, fixed in locality and area, one undivided ninth of it sufficiently satisfies the words "parcel of land." It is plain it would, if there was a partition; and *Id certum est quod certum reddi potest.*

I have had some difficulty in finding the case of *M'Master* v. *Jackson* (1), to which Mr. Justice Bewley refers; but I did find it, since the argument, in 24 Ir. L. T. R. 36. The facts of the case were these:—In 1841 the Misses Matilda, Amelia, and Angela Dunkin were seized in fee of the lands of Loughan or Castlehill, containing 87 acres Irish plantation measure, equivalent to 144 acres statute, subject, as to two-thirds undivided part, to a lease for 2000 years, vested in Anna Maria Warburton. These three Misses Dunkin had one-third undivided, and Miss Warburton two-thirds. On the 22nd November, 1841, Anna Maria Warburton made a lease to Hugh Dunbar, of Castlehill, containing 58 acres (Irish), the estimated two-thirds, for the term of her own life and thirty-one years, at the rent of £130 10*s*. Miss Warburton's reversion vested in Jackson, and the lease of 1841 in M'Master. The lease expired in 1844. Hugh Dunbar M'Master subsequently, on the 4th December, 1869, got from the Misses Dunkin a lease of 29 acres, the estimated one-third, and thus held both two-thirds

(1) 24 I. L. T. R. 36.

under the expired lease, and one-third under the lease of 1869. He served two originating notices, one under the Act of 1881 in respect of what was held under the expired lease, and the other under the Act of 1887 against the Misses Dunkin. The originating notices were dismissed on the ground of its being held in undivided shares. On appeal to the Land Commission the order was discharged, and the originating notices were ordered to be amended by stating expressly the ownership of the undivided shares in each case. On the second hearing a question of non-occupation arose by reason of a subletting of a part of what was in the expired lease. It was this question of non-occupation of part of the holding which was the subject of the appeal in 28 L. R. Ir. 176. The former question was treated as settled, and there was no appeal on it. That decision, of course, does not bind this Court.

I feel all the practical difficulties of applying the Acts to such a case as this. But we have (1) land, (2) land agricultural and pastoral, (3) a tenant of it, and (4) a tenancy subsisting in 1881. I do not think the definition of "holding" is sufficient to exclude it from the Act, or prevent a statutory fair rent being substituted for the contract rent. Upon the whole, my opinion is that the Land Commission was right.

Seeing that this is but the second instance in which this question has arisen during thirteen years, the decision in the present case, that it was not competent for the Land Commission to fix a fair rent on the one-ninth, is not likely to be of much practical consequence.

PORTER, M. R. :—

I regret that I have not been able to come to the same conclusion, or to hold that an undivided ninth of leasehold premises, which is the subject of the present litigation, is within the Land Law Act of 1881 or the Redemption of Rent Act. I found my opinion on the definition of "holding" given in the Act of 1881. I agree with the Lord Chancellor, that no light is thrown upon the question by the Act of 1860, because that was a codifying statute, applying to all tenancies, agricultural or otherwise. Again, as to the Act of 1870, I think it right to abstain from

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expressing any opinion whether an undivided portion of a holding is within that Act or not, for the purpose of supporting a claim for disturbance or improvements. It is a difficult question, and may come up for decision at some future time, and I think it would be wrong to prejudge it, as my opinion in the present case in no way depends upon it. It has not come up during the twenty-five years the statute has been in force, and it is not therefore likely to be of much practical importance. But as to the Act of 1881, it is, no doubt, to be considered an Act *in pari materia* with the Act of 1870. But when you find the more recent Act containing a definition of a word which had been used in the older Act without definition, we cannot expand the definition under the later Act by any construction which might possibly have been put upon the word in the earlier one. Therefore, whether or not the word "holding" in the Act of 1870 will include an undivided portion of land not held in severalty, we find a definition in the Act of 1881, which must have been introduced for some purpose. "Holding" in the Act of 1870 means something corporeal: it means the land itself. But the Act does not specify whether it must be held in severalty or in common with others. But in the Act of 1881 "holding" means a "parcel of land." Mr. Ronan's strongest argument was—Why should an undivided interest not be a "holding" within this Act? I cannot give any answer, but simply that it is not. "Holding, during the continuance of a tenancy, means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy." What is the meaning of "parcel of land"? There are some words so plain as to be difficult of definition; they must be paraphrased, but you cannot define them. A "parcel" of land means something parcelled out, set apart, partitioned off—a portion of land separate and distinct from all other land; but it does not mean an undivided portion, which cannot be pointed out, and which has no existence as a separate thing. Language as clear as that of this definition might have to be explained away if there were a context showing that the literal meaning of the words was inconsistent with the general provisions of the Act, so that the particular term could not be used in its strict sense. But though we have been referred to a great many sections, not one of

them shows that an undivided portion must necessarily be a holding in the sense used in the Act. On the contrary, a great many of them show that such a meaning could not have been contemplated, and they are indeed incompatible with any such idea. There are the provisions in sect. 2 as to subletting, the provisions in sect. 5 as to dilapidations of buildings, deterioration of soil, the erection of a dwelling-house, and so on. Then there is a power to the landlord to enter for the purpose of quarrying or of cutting timber. How can a landlord enter, quarry, or cut timber upon an undivided ninth? This is not conclusive, but it shows the inconsistency with the general tenor of the Act of the contention of the respondent here. This section obviously contemplates land held in severalty. Hunting, shooting, or fishing could not be exercised on an undivided ninth, and resumption by the landlord for the purposes of building, &c., is inconsistent with the nature of land so held. There may be and are many holdings where there are no quarries or timber; but that is a physical fact. In the present case the entire property may be fit for working quarries and cutting timber, yet the nature of the tenure prevents the landlord from doing either upon the undivided share of it.

For these reasons, the Legislature having given us this definition, we are bound to give effect to it; and I am of opinion that this holding is not within the Act. As the Lord Chancellor has pointed out, the case itself is not likely to be of great importance, except to the parties in the present litigation; and, in any case, where the question might hereafter arise, it may be easily avoided by a partition.

FITZGIBBON, L.J.:—

In order to answer the question in the affirmative the tenant must show, in the words of the Act of 1891, that he is "in *bona fide* occupation of a holding to which Part I. of the Act of 1881 applies." I am obliged to say that, having regard to the relation of the Land Acts to each other, I should not feel safe in disposing of this case against the tenant if I thought that he was entitled to any rights under the Act of 1870. The Acts are not merely *in pari materia*, they are incorporated: each of them modifies and gives a meaning to the others; and it would be a startling result

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if a tenant entitled to compensation under the Act of 1870 was not entitled to fix a fair rent under the Act of 1881, especially when sect. 21 of the latter Act has a paragraph in the middle of it expressly referring to the 1st and 2nd sections of the Act of 1870.

It is not necessary for us to decide the question of the right to compensation under the Act of 1870; but it is shirking a difficulty not to mention it. I am of opinion that a tenant must hold a piece of land to bring him within the Act of 1870, as well as within the subsequent Acts of 1881 and 1891. The point did not escape Mr. Butt in his book on the Act of 1870, which he describes as an "attempt to apply legal principles" to the interpretation of "a statute at once the most important and the most difficult passed for many years." He says (page 477):—"Holding means the land which the tenant holds. There is no definition of the word, but if anything in the statute is certain, it is that the word holding is used to denote that which the tenant holds—*the piece of ground* which is the subject of his tenancy"—a prophetic anticipation of "parcel of land."—"It is plain . . . that holding means the land which is held by the tenant. It is never used in the statute in any other sense; and when it is enacted that 'the holding' on which the landlord has acquired the custom, shall not again be subject to it, it is an express and clear enactment that *the land itself* shall not, by virtue of a future letting, be subject to the custom, so as to confer on the tenant any customary right."

I go no further than to say that the *prima facie* meaning of "holding" in the Act of 1870 is *a piece of land*, and that endless difficulty would arise if we attempted to apply even that Act to undivided shares or tenancies in land, of which other undivided interests were outside the Act; for example, the scales of compensation depend on valuation and rent. But when we come to the Act of 1881 we find an express definition which puts the question beyond doubt. Even if there had been no definition, the provisions of sect. 21 as to *bona fide* occupation of the holdings, and as to the imputed tenancies from year to year being at the rents and subject to the conditions of the leases, would have driven me to the conclusion that the Legislature did not think of dealing with anything but pieces of land capable of complete and

exclusive occupation. But there is the definition—"'Holding' during the continuance of a tenancy means *a parcel of land* held by a tenant of a landlord for the same term and under the same contract of tenancy, and, upon the determination of such tenancy, means *the same parcel of land* discharged from the tenancy." What is the meaning of that, in legislation relating altogether to the occupation of land by tenants? Is it possible to apply it to a piece of land of which only one undivided ninth is occupied by a tenant at all, while the very same man holds and occupies the other eight undivided ninths by a superior and independent title? Before putting a meaning on "holding," or on "parcel of land," which would include an undivided share, we should look to the whole code, and we find that every attempt so to construe any clause raises a difficult question, while there are many clauses which plainly cannot apply to anything but an entire piece of land.

The Lord Chancellor says the question could not arise as to improvements. Why not? About the most likely case to occur is the very one before us, where a man who owns nearly the whole of a piece of land becomes tenant to the owners of the remaining undivided portion, in order that he may occupy and improve the whole property, including his own.

How is the fair rent to be fixed? What ground has the Land Commission for holding that the fair rent of an undivided ninth of a holding is one equal ninth of the fair rent of the whole? Again, the tenant here has another remedy. Let him partition the land, and then he can become tenant on fair terms of the piece of land which belongs to his co-owners.

On the whole, it appears to me that the only natural construction of the statutes is one that makes them applicable to land occupied out and out by a tenant or tenants.

I have one remark to make by way of caution. It has been held by the Chief Baron, adopting an expression of Lord Halsbury, that you can have "a conjunct tenant." We are not deciding that you cannot have "a conjunct landlord." We decide only that you cannot have a "holding" consisting of an undivided share of land. In *Re Hutchinson* (1) the Lord Chief

(1) 12 L. R. Ir. 87.

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Baron said:—"In my opinion 'parcel of land' n that definition means the soil, the corporeal hereditament in the particular parcel." He thought, and I agree with him, that "parcel of land" meant a thing that can be surrounded by a fence, and occupied entirely by a tenant or tenants under one contract of tenancy, and we must answer this question in the negative, because we have here no holding that falls within the description of a "parcel of land."

BARRY, L. J.:—

I concur in the opinion of the Master of the Rolls and Fitz-Gibbon, L.J., and I regret that I am obliged to differ from the Lord Chancellor; but on any point connected with this singularly-composed piece of legislation, difference of opinion is not surprising. I was at first very much struck with a broad view of the statute which the Lord Chancellor suggested during the argument, namely, that, after all, the intention of the Legislature was that whenever a tenant had contracted to pay rent for a present tenancy in land, he was entitled by the Act to have that rent rectified, if excessive. A great many persons would take that view of the Act, and indeed it was strongly pressed upon us by Mr. Ronan, who constantly asked—"Why should the tenant in this case not be entitled to have his rent revised?" My answer is, because the language of the Act precludes its being applied to his undivided one-ninth part. To persons unacquainted with the rules for the construction of statutes, by which Judges have to abide, it may not be amiss to refer to a decision of a very recent date in the House of Lords. One of the noble Lords, in giving judgment on a clause in a statute, described the construction which they were called upon to adopt to be such as to render the legislation what "might be described, not inaptly, as barbarous"; and he adds further on—"The result of the one construction, if it be admissible, would be fair and reasonable, the result of the other would be repugnant to justice, and in many cases, as my noble and learned friend, Lord Ashbourne, has pointed out, cruel and unreasonable in the extreme" (1). Notwithstanding all that, the learned Lord was forced (by the rule of construction) to adopt

(1) *Per* Lord Macnaghten, in *The Crystal*, [1894] A. C. 529.

that barbarism, and inflict that injustice. The question in the present case is, whether a tenant of an undivided ninth part of a holding, circumstanced as here, is, within the meaning of the Act of 1881, entitled to have a fair rent fixed for the undivided part. The landlord's counsel, in his very able argument, relied on the definition of "holding" in the Act of 1881; and he contended, and in my opinion rightly, that such words, especially when regard is had to the general context of the Act, cannot include a tenant of an undivided part of the holding, possessing that undivided part in such manner and under such title as the tenant here, and that such tenant is not entitled, acting *per se*, and in respect only of his own undivided part, to have a fair rent fixed for that part. Whether, when there is a joint contract of tenancy, *e.g.* where a letting is made to five persons, the whole five, though holding under the terms of the contract of tenancy in undivided parts, might not, in conjunction, have a fair rent fixed for the entire holding, was not argued before us. The counsel for the tenant, on the other hand, argued that "a parcel of land" does not mean a definite specified area. I think it does. He gave, by way of instance, that in conveyancing "an undivided moiety" is described or referred to as the "parcels" conveyed by the deed, and so on. But the ordinary meaning of the word is a portion of land physically defined. As to a *definition* of "parcel of land," the word "parcel" (as the Master of the Rolls said) is so simple that you cannot define it. You may describe it in a paraphrastic way, or illustrate it, but I should say the only definition you can give is "*verbum ipsum loquitur.*" Mr. Ronan further contended that "holding," as defined by this Act, must, under the definition section of the Act of 1870, include holdings of undivided parts, so as to entitle a tenant of such holdings to compensation for improvements. The Lord Chancellor has yielded to this argument, and has expressed his opinion that if a tenant be (as his Lordship thinks he is) entitled *per se* to compensation for improvements on his one-ninth, under the Act of 1870, it necessarily follows that he would be entitled *per se* to have a fair rent fixed for that part, under the Act of 1881. As to whether a tenant of an undivided part is entitled *per se* to compensation for improvements for that part, under the Act of 1870, I give no opinion. I do not think it

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necessary for the decision of this case. But, assuming that a tenant of only an undivided part is entitled to such compensation, I do not agree that, as a consequence, he is entitled to have a fair rent fixed, as claimed here. The incorporation clause in sect. 57 of the Act of 1881 does not, in my opinion, have such an effect. That clause is—"Any words or expression in this Act *which are not hereby defined, and are defined in the Landlord and Tenant (Ireland) Act, 1870*," shall, unless there is something in the context of this Act repugnant thereto, have the same meaning as in the last mentioned Act; and the Landlord and Tenant (Ireland) Act, 1870, except in so far as the same is expressly altered or varied by this Act, or is inconsistent therewith, and this Act shall be construed together as one Act." By the express words of the first provision in this clause the words to have the same meaning as in the Act of 1870 are words *not defined in the Act of 1881*, but defined in the Act of 1870. The definition of "holding" in the Act of 1870 is this:—"*All land* of the above character held by the same tenant of the same landlord for the same term, and under the same contract of tenancy." But the word "holding" is defined by the Act of 1881; and how is it to have the same meaning as in the Act of 1870, under the provisions which give that meaning only to words "*not*" defined by the Act of 1881? It may be said, and, to sustain the argument for the tenant, must be contended, that the two definitions are intrinsically identical, or are made so by the provision in sect. 57 (1881), that the two Acts shall be "construed together as one Act." But if this be so, what reason can be assigned for the introduction into the Act of 1881 of any definition at all? and why should the definition, thus unnecessarily inserted, be altered from its original (so alleged) synonym by the introduction of the word "parcel"? The argument on the tenant's part amounts to giving no effect whatever to the word "parcel"—a mode of construction contrary to general rule, and in favour of which I cannot make an exception in this instance.

I have already said that I give no opinion as to whether the Act of 1870 gives a right of compensation for improvements in respect of an undivided part of a farm to the tenant of such undivided part. But my opinion in this case is, that the tenant's

undivided one-ninth is not "a parcel of land" constituting a "holding" which, under the Act of 1881, entitles him to have a fair rent fixed for it.

The term "holding" was, I think, for the first time introduced into the legal language of the law of landlord and tenant in Ireland by the Act of 1870; and I am not sure that the word was not first introduced into statutory nomenclature in England by the Agricultural Holdings Acts in that country. These Acts are, I rather think, and certainly ought in common sense to be, in respect of their subject-matter, their frame, and their chronology, legitimate subjects for our consideration in interpreting the word "holding" in our Acts of 1870 and 1881. The English Acts are two, viz. the Agricultural Holdings (England) Act, 1875, and the Agricultural Holdings (England) Act, 1883. Of these Acts the Lord Chancellor has referred, as I think, only to one—the Act of 1875. That Act thus defines the word "holding":—"Holding" includes "*all land* held by the same tenant of the same landlord for the same term, under the same contract of tenancy." That is substantially the same definition of "holding" as in the Land Act of 1870; and it is difficult not to see that, if the two Acts were not drafted by the same hand, at least the English Act remarkably resembles the Irish in style and phraseology. But what occurs? The English Act of 1875 followed in time and definition the Irish Act of 1870. Then comes the Irish Act of 1881; and in that Act is found the significant, the all important, change in the definition of "holding," by substituting for "all land" (as in the Act of 1870) the words "a parcel of land."

But then comes the English Agricultural Holdings Act of 1883, to which I did not understand the Lord Chancellor to refer. That Act repealed and amended the English Act of 1875, and in it the definition of "holding" is altered from "all land" in the Act of 1875 (corresponding to "all land" in our Act of 1870) to "any parcel of land" (corresponding to "a parcel of land" in our Act of 1881); and we are asked to hold that the Legislature has, in these two Acts, deliberately introduced, by way of change of definition, this word "parcel" (*prima facie* inapplicable to an undivided part), but that the word is to have no special meaning, no significance, no operation, beyond "all land" in the original definitions.

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It is difficult to conceive that the word "parcel" in the English Act was intended to include an undivided part, held as in this case; but even if it were so, it would not be conclusive, as the English Act contains no such provisions respecting a "holding," as the conditions and incidents contained in our Act of 1881 respecting a "holding" under a statutory tenancy. The Master of the Rolls and Lord Justice FitzGibbon have shown and discussed the incongruities and impossibilities in any attempt to apply these conditions and incidents to an undivided part.

There is a section in the Act of 1881 which may be found to have some important bearing on the question before us, but has not been referred to by counsel on either side, possibly because each was afraid of it. I mean sect. 3. That section is suggestive of the idea that the draftsman intended that provisions as to a statutory tenancy should not, or was conscious that they could not, be applied to an undivided part, such as we had to deal with here; but being somewhat, though perhaps not practically or entirely, aware of the difficulties arising on the death of a tenant in Ireland, he thought by sect. 3 to obviate these difficulties, and secure, in the case of a statutory tenancy, that on the death of the tenant, on the one hand the benefit of the Act should not be lost to his family, but that on the other hand the principle should prevail that there should be only one statutory tenant in succession to an original statutory tenant. But however all this may be, as the section was not referred to at the bar, I give no opinion upon it.

I am of opinion that the claimant is not entitled to have a fair rent fixed (1).

Solicitors for the landlords: *T. R. Wright & Sons.*
Solicitor for the tenant: *Wm. Guest Lane.*

R. D. M.

(1) See 59 & 60 Vict. c. 47, s. 48 (2).—[REP.]

M'CREA *v.* KNIGHT (1).

Appeal.
1896.
Feb. 25, 26.

Practice—Service of writ out of the jurisdiction—R. S. C. I., Order XI., Rule 1 (f)*—Contract made within the jurisdiction—Discretion of the Court of first instance.*

The plaintiffs were contractors in Belfast, and the defendants were cement merchants in London. In September, 1888, M., a broker, who had an office in Belfast, called on the defendants in London to negotiate for a supply of cement, to be delivered to the plaintiffs in the north of England, for some works, to be executed in England, upon which they were engaged. Some correspondence between plaintiffs and defendants ensued, in which some minor details of the proposed contract were discussed. M. (who, as the Court held, had the plaintiffs' authority to do so), on the 10th September, had an interview with the defendants in London, when he announced that the plaintiffs would agree to the defendants' terms, and orally accepted, on the plaintiffs' behalf, the offer made by the defendants; but it was contemplated by both parties and by M. that there should be a written contract, either of a formal character, as suggested by the plaintiffs and M., or an acceptance in writing of a letter addressed by the defendants to the plaintiffs, which the defendants considered would be sufficient. In the result the plaintiffs wrote from Belfast on the 15th September to the defendants, accepting their offer (setting out specifically the terms agreed to by M. on the 10th). The defendants supplied cement to the plaintiffs until 1890, when they suspended the delivery, alleging that they were entitled, under the contract, to spread the delivery over a period of three years. The defendants alleged that this was a breach of the contract, and obtained leave from the Queen's Bench Division in Ireland to issue and serve a writ on the defendants out of the jurisdiction:—

Held, by the Court of Appeal, (1) affirming the Queen's Bench Division, that the contract was made in Ireland, within the meaning of R. S. C. I., Order XI., Rule 1 (*f*); (2) that the Court of Appeal ought not to interfere with the discretion of the Court of first instance in allowing service out of the jurisdiction, unless it was manifest that the discretion had been wrongly exercised.

Semble, however, *per* FitzGibbon, L.J., that the balance of convenience in the present case was in favour of a trial in England.

APPEAL from an order of the Queen's Bench Division, dated the 28th January, 1896, refusing the defendants' motion to set

(1) Before FITZGIBBON, BARRY, and WALKER, L.JJ.

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aside an order for service of the writ out of the jurisdiction.

The plaintiffs, M'Crea and M'Farland, were contractors, residing in Belfast, who, in 1888, had contracted to execute portion of the waterworks at Thirlmere, for supplying Manchester with water. The defendants, Knight, Bevan, and Sturge, were cement manufacturers in London. On the 30th August, 1888, one M'Naughton, a broker, wrote from Belfast to the defendants, offering to act as agent for the defendants in the sale of cement, and stating that a friend of his was about to contract for 12,000 tons for delivery at an English port, and if they would be willing to quote through him, and allow the usual commission, he thought he could get them the order. In consequence of this the plaintiffs and defendants entered into correspondence. On the 6th September the defendants wrote to the plaintiffs—"We are prepared to offer 8000 tons of our Portland cement, spread over three years, deliverable into your vessels at our works at in sacks, at 26*s.* per ton, sacks in addition 1*s.* 1*d.* each, allowing 1*s.* each when returned with fair promptitude and in fair order to our works, payment, cash without discount." On the 8th September the plaintiffs replied:—"We accept your offer to supply us all the Portland cement we may require in the construction of Thirlmere Acqueduct, Contract No. 5, . . . on the following conditions, . . . sacks shall be charged for at 6*d.* until they are returned. . . . The price f. o. b. at London shall be 26*s.* per ton. Settlements to be made monthly. In monthly settlements it is the custom of the trade to allow 2½ per cent. off, and we think you should concede this. The cement to be loaded at such times, and in such quantities, as we may require to."

On the 10th September the defendants wrote, declining to modify their original tender. After the letter was written, and before it was posted, M'Naughton called on the defendants, with a telegram, stating that he was authorised to close the contract. M'Naughton had telegraphed to the plaintiffs:—"Have seen Bevan. No chance of them conceding either bag or discount question. Think you should authorise me to close at price quoted, they guaranteeing specification, you option, supplying own bags. Wire M'Crea's reply." To which an answer was received from

M'Clean, a clerk in M'Naughton's office in Belfast, to M'Naughton in London:—"Close on best terms. Still think should concede bags. M'Crea authorise you."

In consequence of these telegrams the defendants added a postscript to their letter:—"Since writing the above Mr. M'Naughton has called upon us, and informs us that he has exchanged a telegram with your good selves, and that you have authorised him to book the contract for you."

On the 12th September there were two letters written by M'Naughton to the defendants, in one of which he said:—"I am to see Mr. M'Farland to-day; he likely wants to show me draft of agreement to be submitted to you for confirmation. . . . Please confirm at your convenience our verbal agreement *re* commission to be paid me on Thirlmere contract, and oblige." In the second he stated:—"I have seen Messrs. M'Crea and M'Farland, who are satisfied with me closing with you, although they think you should have given way on the bag question. There are one or two matters they mentioned which they asked me to get you to agree to, pending a formal agreement being made out."

On the 13th September M'Naughton wrote to the defendants:—"Messrs. M'Crea and M'Farland will send you written acceptance of contract to-morrow." On the same day, the 13th, the defendants wrote to M'Naughton:—"We see no occasion whatever for any formal agreement to which you allude. All that is needed is a simple line from Messrs. M'Crea & M'Farland, acknowledging our last letter, and stating we are in conformity."

On the 14th September M'Naughton wrote to the defendants:—"They are writing you to-day, confirming their acceptance of your offer verbally made by me. There is really nothing in the bags, as they are most particular in not loosing any. . . . Your letter confirms what I have already told my friends, that there is not the slightest necessity for any agreement further than a letter, as you suggest."

On the 15th September the plaintiffs wrote to the defendants:—"We delayed replying to your letter of the 10th instant until we had an opportunity of seeing Mr. M'Naughton on some matters of detail. We now accept your offer to supply us during the next

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three years with the cement we require in the construction of the Thirlmere Aqueduct, Contract No. 5. Say eight thousand tons, more or less, f. o. b. in London, at 26*s.* per ton; bags 1*s.* 1*d.* each, and 1*s.* each to be allowed when they are returned."

The defendants delivered to the plaintiffs, up to March, 1890, about 5740 tons of cement, but refused, in that month, to deliver 400 or 500 tons to the plaintiffs' order, on the ground that they were only bound to deliver the cement spread over three years, and the plaintiffs were only entitled to have the balance of the 8000 tons delivered in average quantities of from 200 to 240 tons every two months.

In an action for breach of contract, leave was given to issue the writ for service out of the jurisdiction. The defendants applied to discharge this order, but the Queen's Bench Division refused the application. From that order the defendants appealed. The plaintiffs alleged in their affidavit that all their necessary witnesses resided in Belfast.

Kennedy (with him *Sullivan, Q.C.*), for the appellants:—

The contract was made in London on the 10th September. There was no change subsequently in any of its terms, and the mere fact of proposing to put it in writing makes no difference. M'Naughton was the agent of the plaintiffs, and was acting for them. The works were in England. The breach of contract alleged also occurred in England, and it is much more convenient that the case should be tried there. It is an English contract: *Hamilton* v. *Barr* (1).

The telegram mentioned in the postscript of 10th September is still undisclosed. The plaintiff is bound to disclose everything to the Court: *Attorney-General* v. *Irish Society* (2); *Republic of Peru* v. *Dreyfus* (3).

Cooke (with him *Ross, Q.C.*), for the respondents:—

The contract was made in Belfast by the posting there of the letter of the 15th September. There was no concluded contract on the 10th September. The parties were bargaining about terms

(1) 18 L. R. Ir. 297. (2) 26 Ir. L. T. R. 56. (3) 55 L. T. (N. S.) 802.

after that, and, by the correspondence all through, it appears that a written contract was contemplated. M'Naughton was not our agent: he was to get his commission from the defendants, and acted for them.

The Queen's Bench had jurisdiction to make the order, and as there is jurisdiction, the Court will not interfere with their discretion: *Strauss* v. *Goldschmidt* (1); *Reynolds* v. *Coleman* (2).

FITZ GIBBON, L.J.:—

Feb. 26.

There are two questions on this appeal, one of jurisdiction, the other of discretion. The question of jurisdiction depends on whether the contract in respect of which the action has been brought was made within the jurisdiction. In other words, whether it comes under the words of Order XI., sub-sect. (*f*), "made and entered into within the jurisdiction." We are all of opinion that, on the true construction of the correspondence, this contract was strictly and technically made within the Irish jurisdiction, for the purposes of that rule. But, in substance and reality, I think the transaction was English, and, as matter of discretion, I would have so treated it.

M'Naughton, an ambulatory broker, went to the defendants' place of business in London, to negotiate for a supply of cement, to be delivered to the plaintiffs in England. He had a clerk in Belfast, with whom he was in telegraphic communication, and who, in turn, was in communication with the plaintiffs there. In London all the substantial terms of the sale were arranged between M'Naughton and the defendants, M'Naughton's clerk in Belfast informing his employer by telegram of the plaintiffs' views. In the end M'Naughton went, with a telegram from Belfast in his hands, into the defendants' office in London, and said that he would close. That the bargain, so far as it rested in parol, was then and there completed appears both on the affidavits and also from the postscript to the letter of the defendants to the plaintiffs of September 10, 1888, which is in these terms:—"Since writing the above Mr. M'Naughton has called upon us, and informs us that he has exchanged a telegram with your good

(1) 8 Ir. L. R. 512. (2) 36 Ch. D. 464.

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selves, and that you have authorised him to book the contract for you. We need only repeat that we shall devote the very best attention of which we are capable." The plaintiffs now deny that M'Naughton had their authority to book the contract; but, if the case depended on that question, I should find, as a fact, that M'Naughton had that authority, because M'Naughton's clerk saw the plaintiffs in Belfast immediately before he sent the final telegram. That telegram is not produced, but the plaintiffs have produced another document which the clerk showed them, and on which appears a note by the clerk to close on the best terms he could, subject to a term as to bags. I am satisfied that that note represents the substance of the authority which the plaintiffs gave, in order that it might be sent on to M'Naughton; and, in short, I find that the telegram which has not been produced gave M'Naughton authority to close the bargain. I should therefore hold M'Crea & M'Farland bound by the agreement which was made with the defendants in London by M'Naughton. All the substantial terms of the bargain were then settled, and they were so settled in London, through M'Naughton acting there as the authorised agent of M'Crea & M'Farland, who were personally in Belfast. If the action was, or could have been, brought upon this London agreement as a complete contract, it could not be tried in Ireland.

But, upon the construction of the correspondence, I hold that the final contract was not made on that occasion. It appears clear on the documents that it was an understood term throughout, that the contract was to be put into writing, and that a final and binding contract embodying it was to be signed by the principal parties, the plaintiffs and the defendants, irrespective of M'Naughton and his negotiations altogether. This appears to have been the intention and understanding of all the parties, M'Naughton included. The plaintiffs stated that they wanted a formal agreement; the defendants said that they wanted a note affirming the matter; and M'Naughton says that there was to be a letter signed. The "contract," therefore, that was made in London was only an agreement by word of mouth, settling the terms of the sale, but not to become a complete or binding contract until reduced to writing and signed by the principals, and the legal

contract on which the action is brought did not come into existence until the necessary document was signed. Thus, the case is reduced to the ordinary one of a proposal in writing posted from London to Belfast, with an acceptance in writing posted from Belfast to London. The venue of such a contract is settled by authority. It is too late to argue that the contract remains open until the acceptance is received. The final and irrevocable act of assent to the contract takes place when and where the letter of acceptance is dropped into the post office. That was done in this case in Belfast, and therefore, on the authorities, the contract was made in Ireland, and the Queen's Bench had jurisdiction to make the order appealed from.

This brings us to the question of discretion, under the rule which provides that "where leave is asked . . . to serve a writ . . . under the last preceding rule, the Court or Judge to whom such application shall be made shall have regard to the amount or value of the claim or property affected, and to the comparative cost and convenience of proceedings in Ireland or in the place of the defendant's residence."

The authorities are very strong that, wherever the question is one of discretion, the Court of Appeal ought to be very slow to differ from the Court of first instance. In another case (*Curley* v. *Gregan* (1)) I dissented from all my colleagues when they reversed an order made in the exercise of their discretion by the Court below, because I thought that such a course tended to uncertainty and to litigation; and on this branch of the case I might say no more than that the order appealed from was not so manifestly wrong as to make it our duty to reverse it.

But, as the case has come here for re-consideration, the parties are entitled to know our opinions; and, speaking for myself, if I had to decide it in the first instance, I should have, as a matter of judicial discretion, come to a different conclusion. The second clause of the rule shows that the first is not mandatory. In other words, even where service out of the jurisdiction may be allowed, it is not necessarily to be allowed, and it ought not to be allowed, unless there is some ground of "comparative con-

(1) [1895] 2 Ir. R. 320.

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venience" to guide the discretion of the Court to the conclusion that a foreign defendant ought to be brought to Ireland to stand his trial. I cannot limit the meaning of "convenience." It means fitness, propriety, and suitableness—each and all three in the most general sense. In the present case, although the legal contract was technically made by dropping a letter into a box in Ireland, the transaction was English. An Irish firm had secured a large English work, and bought materials in England from an English firm for that work, making their bargain in London, through an agent there. This is a precedent which might lead to very undesirable results as against Irish parties if the English rules or practice followed our decision. If an English contractor came over here, and contracted to execute works in Ireland, and bought all his materials here, the dropping of his letters into the post in some English town where he had an office, would entitle him to sue everyone connected with his works in England! Besides, the correspondence shows that the most important, if not the only, question really in dispute was not the quality of the cement supplied, but whether the quantity supplied from time to time was according to the contract. All considerations of propriety and convenience go to show that this question ought to be tried where the works were done. Upon this question extreme views have been expressed upon each side. Mr. Ross contended that if the plaintiffs had demanded the whole 8000 tons of cement in three months they were entitled to get it. The defendants put forward an equally extreme view, that they were entitled to spread the delivery over the whole period of three years during which the works were in construction, and that they might even fix a limit, such as 240 or 250 tons every two months, to suit themselves. An intermediate construction would probably be the right one. The cement was required for the construction of certain specified and known waterworks at Thirlmere. Anyone who knew the works could approximately say how much cement would be wanted at any given time. It certainly was not intended that 200 tons should be delivered every month, or every two months, during the whole period allowed for construction. A larger quantity would be required at the beginning, when the works were once started, than when they were approaching completion.

This is borne out by the delivery of 2000 tons at the beginning. The fair construction of the contract, in my opinion, is, that this large quantity of cement was to be supplied, while the works were in progress, in such reasonable quantities as the construction of those works rendered necessary. Such a question could be best decided with the help of witnesses who knew the works, and could tell what amount of cement was required for them, what quantities were supplied, and what interruption or inconvenience, if any, was caused by the insufficiency or irregularity in the supply. The true subject of controversy is an English matter, which ought to be tried in England, with the aid of English witnesses. The plaintiffs say that their witnesses are now all in Ireland; but that statement is not, in my opinion, entitled to any weight, when, according to the plaintiffs' own case, there was a complete breach of this contract in England six years ago, and they have delayed the action for six years, until after the works have been all finished, and the plaintiffs have brought back all their witnesses to Ireland. It looks very much as if they postponed their attack upon the defendants from Ireland until they had first secured their own safe retreat to that vantage-ground. This question as to the plaintiffs' witnesses being in Ireland is not referred to by the Judges in the Court below, and seems to have been first pressed here.

The appeal will be dismissed, because we do not feel justified in overruling a discretionary order under the circumstances, but we shall require the plaintiffs to undertake not to make any claim, or to raise any question, as to the quality of the cement.

I understand that if that question had been pressed, my colleagues would have agreed with me in holding that the balance of convenience entirely preponderated in favour of England as the place of trial.

BARRY, L.J.:—

I have nothing to add, the question having been discussed so fully by FitzGibbon, L.J. I am of opinion, although I arrived at the conclusion not without some difficulty, that this contract was made within the meaning of the section of the

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Judicature Act, within the Irish jurisdiction, and the Queen's Bench Division had jurisdiction to make the order for service of the writ out of that jurisdiction. But I think that where, as here, the jurisdiction is one of a somewhat discretionary character, this Court ought to be very slow to disturb the exercise of its discretion by the Court below. If I were in the Court below I probably should not have exercised the discretionary jurisdiction in the same way as the Queen's Bench Division has done; but of this I am clear, that the Judges in the Court below having exercised their discretion, I am not so certain that they are wrong that I should be justified in reversing them.

Walker, L.J. :—

I concur. On the first point it is clear, upon the correspondence, that the written acceptance of the plaintiffs in Belfast was contemplated; and finality of the matter, as to making of the contract, occurred when the letter accepting the offer was written and posted in Belfast.

If that be so, this contract was made in Ireland, and the case comes within the rule, although the breach occurred out of the jurisdiction. The jurisdiction is therefore attracted, and the order is regular. As to whether the power should be exercised, there are certain limits fixed. The Court is to have regard to the question whether there is a good cause of action or a sham one; and it should also have regard to other matters—the comparative cost and convenience of proceedings in Dublin or in London. But when the jurisdiction is once conferred, the *onus* is cast upon the defendants of displacing the right arising from the contract being made in Ireland.

We have to remember that the matter arose from the defendants' seeking and making a contract in Belfast. The question to be tried is—whether the cement was supplied at such times and in such quantities as plaintiffs required; and if not, the damage will come to be assessed under several heads: one will be the interruption caused to the plaintiffs' works, another head will turn on the price of the cement and its quality. The plaintiffs say their witnesses are in Belfast. I do not think we can minimise

that by saying the defendants are in England. The engineer of the plaintiffs and some one of themselves are plainly necessary: they live in Belfast. The engineer of the defendants would be necessary. As to the price of the cement, I lay that entirely aside, because the price must be well known, and cannot be a serious matter of dispute. If we were trying the case of a cargo of coal or corn, everyone would know what the price was at a given date.

I see no reason for interfering with the exercise of discretion in the Court below. There are no materials before us to enable us to pronounce on the comparative cost in the abstract of trying a case in England or Ireland.

Solicitor for the plaintiffs: *William Graham.*
Solicitor for the defendants: *John O'Connor.*

R. D. M.

Q. B. Div.
1896.
June 2.

WARNOCK *v.* MANN (1).

(1895. No. 19.)

Practice—Motion to dismiss for want of prosecution—"Proceeding"—Notice of intention to proceed—R. S. C. (1891), *Order LXIV., Rule* 11.

A motion to dismiss for want of prosecution is not a proceeding within Order LXIV., Rule 11, so as to require a month's notice of intention to proceed "where there has been no proceeding for one year from the last proceeding had" in the action.

MOTION for an order that the action be dismissed for want of prosecution.

The action was brought for £9 odd, for goods sold and delivered, upon a specially indorsed writ, issued on the 3rd January, 1895, and served upon the 23rd February. The defendant delivered her defence on the 6th March, 1895. No further step was taken by either party in the action until notice of the present motion was served by the defendant on the 26th May, 1896. Affidavits were filed, by the defendant swearing that she had a good defence to the action, and by the plaintiff that the amount sued for was justly due. On the 28th May the plaintiff's solicitor wrote to the solicitor for the defendant, saying that there was no use incurring the expense of the application to the Court, and that, if a note of the costs were made out, he would pay the proper sum. A bill of costs for £9 16*s.* 6*d.* (including counsel's brief and fee, given on the 23rd May, on the motion to dismiss) was furnished. The plaintiff's solicitor replied, declining to pay this sum, and stating that his client would seek the permission of the Court to proceed with the action.

Williamson, for the defendant:—

The pleadings closed, in default of reply, on the 27th March, 1895: R. S. C., Order XXIII., Rule 1; Order XXVII., Rule 13;

(1) Before O'BRIEN, JOHNSON, HOLMES, and GIBSON, JJ.

and the defendant now applies, under Order XXXVI., Rule 11, that the action be dismissed.

H. W. Jackson, for the plaintiff, contended that, as more than a year had elapsed from the last proceeding in the action, a month's notice of intention to proceed was necessary, under Order LXIV., Rule 11, prior to the institution of the present motion; and further submitted that, under the circumstances of the case, the Court should allow the action to proceed.

Williamson, in reply, referred to *Lumley* v. *Thompson* (1).

[JOHNSON, J., referred to the notes in the Annual Practice (ed. 1895), p. 1090, on the corresponding English Rule (Order LXIV., Rule 13), and to *Houlston* v. *Woodward* (2), where it was held that notice of intention to proceed was not necessary before issuing execution upon a judgment obtained more than a year previously, "proceeding," under the rule, being there held to be a proceeding towards, not after, judgment.]

THE COURT allowed the action to proceed on the terms of the plaintiff paying to the defendant £3 3*s*. as costs of the motion, expressing the opinion that an application to dismiss for want of prosecution was not a "proceeding in the action" within Order LXIV., Rule 11.

Solicitor for the defendant: *J. Duff.*
Solicitor for the plaintiff: *J. E. Peel.*

A. E. R. J.

(1) 5 Dowl. 558. (2) 78 L. T. J. 113.

Q. B. Div. 1894.
Nov. 22, 23. Dec. 1.
Appeal. 1895.
April 26, 29. May 5.

KNOX *v.* GREAT NORTHERN RAILWAY CO. (1).

(1894. No. 463.)

Railway—Carriage of goods—Horse—Alternative rates—Condition relieving from liability—Contract made after injury.

The plaintiff's horse was taken by his groom to Armagh railway station, to be sent to Dublin. A porter in the employment of the defendants tried to put the horse into a box, but failed in the attempt, and the horse slipped and received serious injuries. At the trial of the action the jury found that these injuries were caused by the negligence of the defendants, but not however amounting to wilful misconduct. The attempt to box the horse was afterwards successfully carried out. The groom then, after the injuries were done, signed a contract in writing for the carriage of the horse at the defendants' reduced rate, subject to conditions, one of which was:—"That at the reduced rate the Company carry at owner's risk, and exempt from all liability not occasioned by the wilful misconduct of their servants, acting within the scope of their authority." There was an alternative higher rate, under which the Company undertook the ordinary liabilities of carriers:—

Held, by the Queen's Bench Division, and by the Court of Appeal (Barry, L.J., *diss.*), that the defendants were not liable.

NEW TRIAL MOTION.

The action, which was tried before Mr. Justice O'Brien and a special jury on the 19th and 20th April, 1894, was brought to recover damages, laid at £38, for injuries to the plaintiff's horse caused by defendants' servants negligently and improperly placing the horse in a horse-box at defendants' station at Armagh, and in negligently handling and managing said horse at said station.

The defendants in their defence traversed the plaintiff's averments, and pleaded that the said horse was received by the defendants under a contract signed by the plaintiff, a condition of which was that in case of animals for which a contract note with two rates of carriage should be offered to the customer, the defendants would give him the alternative of carrying at

(1) In the Queen's Bench Division before JOHNSON, HOLMES, and MADDEN, JJ.

either rate—at the full rate, which would be charged when the contrary was not expressed, the Company undertaking the duties of carriers subject to the conditions in the said contract note and their statutory rights; at the reduced rate, receiving and carrying at the owner's risk, exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of their authority; that the plaintiff elected to have his horse carried at the lower rate, and that the injuries complained of were not occasioned by the wilful misconduct of the defendants' servants acting as aforesaid (1). The defendants further pleaded that the injuries complained of were solely caused by the restiveness of plaintiff's horse, for which the defendants, under the conditions of the contract, were not liable.

The facts proved in evidence at the trial, so far as here material, were to the following effect:—On the 11th December, 1893, the plaintiff's groom, Charles Creighton, took the horse to Armagh Station to be boxed and sent to Dublin by the 10.35 train. The horse, while being boxed at the station, slipped his leg down between the platform and the horse-box, and sustained a serious injury. After the accident the horse was put into the box, and Creighton then went to the ticket office and purchased a ticket at the lower of the alternative rates of carriage offered by the Company. Creighton was aware that there were two rates of carriage. Creighton stated that the reason he sent the horse on, notwithstanding the accident, was that the horse was being consigned to a veterinary surgeon. He also stated that when purchasing the ticket he told the booking clerk that the horse had met with an accident. The booking clerk denied having heard this statement. It was the ordinary custom for persons booking horses to take the ticket after the horses were boxed. At the close of the plaintiff's case, *Campbell, Q.C.*, applied for a direction on the ground of the special contract, referring to *Hodgman* v. *West Midland Railway Co.* (1), and contending that the subsequent contract

(1) The special contract here pleaded was contained in the 4th of the conditions printed on the back of the tickets issued by defendant Company. This condition is set out fully in the judgment of Johnson, J., *infra*, p. 637.

(2) 5 B. & S. 173.

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related back and covered the whole transaction, and on the ground that there was no evidence of wilful misconduct; and, at the close of the evidence, he again applied for a direction (1) on the ground that there was no evidence of negligence on the part of the Company, and (2) on the ground that the contract excluded liability for anything but wilful misconduct.

The learned Judge refused to direct, save as to wilful misconduct, of which, in his opinion, there was no evidence. He withdrew the special contract alleged to exempt the Company from liability altogether from the consideration of the jury. The jury found for the plaintiff with £25 damages. Judgment was entered accordingly.

This verdict may be taken as sufficiently giving the general effect of the evidence at the trial—namely, that the accident was caused by the negligence, not amounting to wilful misconduct, of the defendants' servants, and was not caused by the vice or restiveness of the horse.

Counsel for the defendant Company now moved that the verdict and judgment had for the plaintiff should be set sside, and the verdict and judgment entered for the defendants on the ground that the learned Judge should have so directed, as the horse was received and carried at the owner's risk, and as there was no evidence of negligence by the defendants or their servants, and on the ground that the verdict was against evidence and the weight of evidence, or for a new trial.

Campbell, Q.C., Meredith, Q.C., and *R. F. Harrison*, for the defendants.

O'Shaughnessy, Q.C., and *Bates*, for the plaintiff.

The arguments appear sufficiently from the judgments.

Cur. adv. vult.

Dec. 1.

JOHNSON, J.:—

This is a motion on the part of the defendants to set aside the verdict and judgment had for the plaintiff at the trial before Mr. Justice O'Brien, and to enter the verdict and judgment for the defendants on the ground that the learned Judge should have so directed, as the horse in the pleadings mentioned was received

and carried by the defendants at owner's risk. The action was for damages for injuries to the plaintiff's horse by the defendants' servants negligently and improperly placing the horse in a horse-box at defendants' station at Armagh, and negligently handling and managing the horse at that station. The defendants traversed the alleged negligence, and pleaded a special defence that they received the horse under a contract signed by the plaintiff, a condition of which offered an alternative rate of full or reduced carriage to customers: at the full rate undertaking the ordinary duties of carriers for hire, subject to the conditions in the contract note and their statutory rights; and at the reduced rate carrying at the owner's risk exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of their authority; that the plaintiff elected to have the horse carried at the reduced rate, and that the injuries complained of were not occasioned by wilful misconduct of the defendants' servants. The condition on which this defence is based was under review in this Court in *Moore* v. *The Great Northern Railway Company* (1), and was decided to be reasonable. The learned Judge ruled at the trial that there was no evidence of wilful misconduct on the part of the defendants' servants; but on the issue of negligence the jury found for the plaintiff with £25 damages. No objection is now made to this ruling or finding; but, although the defendants' counsel called for a direction on the special defence, the learned Judge withdrew that defence from the jury (thus in effect directing on that defence for the plaintiff), and entered the verdict and gave judgment for the plaintiff with £25 damages. This verdict and judgment for the plaintiff the defendants now seek to set aside. The facts proved at the trial and material for present consideration are, shortly, these:—Creighton (plaintiff's servant) whose authority in the matter is not questioned, knew that the defendants gave notice that horses were received, forwarded, and delivered by them only on the terms and stipulations of express contract in defendants' printed ticket offering to the customer his choice of a full or reduced rate of carriage with the different liabilities attached to each rate, which ticket was to be filled up with

(1) 10 L. R. Ir. 95.

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the rate when selected by the customer and signed by or on behalf of the owner. Creighton had personal experience of sending horses by the railway: he had often "booked horses," and therefore knew that the defendants permitted their customers to postpone taking and signing the ticket until the horse was placed in the horse-box ready for conveyance; and to reserve, until he came to take and sign the ticket, his election at which rate and under what liability he elected to send the horse. Accordingly, Creighton brought the horse to the defendants' station for the purpose of sending the horse to Dublin by the defendants' railway on the terms on which alone he knew the defendants would receive, forward, and deliver the horse, and he proceeded, with the assistance of the defendants' servants, to have the horse placed in the horse-box before he actually took or signed the ticket under which the horse was to be received and conveyed by the defendants; but owing, as it must now be taken, to the negligence of the defendants' servants, the horse slipped his near hind leg down into a vacant space between the horse-box and the platform and was injured. *Hodgman* v. *The West Midland Railway Company* (1) to which our attention was called, appears to me to establish that, when the horse enters the premises of the railway company for the purpose of being "carried" (that is of being received, conveyed, and delivered) by the railway company, the delivery of the horse by the customer to the Company to be carried, and the receipt of the horse by the Company for that purpose, commences; the inchoate contractual relation of customer and carrier is then entered upon and exists; and, in the present case, was, on the terms of the special contract, known to Creighton, and which was to be contained in the ticket which he was to sign. After the horse had met with this injury Creighton, with assistance, put the horse into the horse-box, and considering him fit for the journey went to the office to get and sign the ticket. The evidence is conflicting whether or not he complained to the booking clerk that the horse had been injured, but this does not appear to me to be material because the clerk had no authority to make any alteration in the terms of the ticket; he offered Creighton his choice of the

(1) 5 B. & S. 173.

two rates, and Creighton, with the knowledge that the horse was injured, elected to take the reduced rate with the liability incident to it, and signed the ticket, thus completing and "binding" (1) the plaintiff by the special contract which had its inception at the commencement of the delivery of the animal to, and its receipt by, the defendants to be forwarded and delivered in Dublin by them. The question then is, what is the construction of this special contract which from its inception governed the dealing between the customer and carrier? On its face is "Ticket for carriages, horses, and dogs (carried subject to conditions printed hereon)." The endorsement is "The Great Northern Railway Company (Ireland) hereby give notice of the following conditions on which they receive traffic for conveyance. No servant of the Company has authority to add to or vary the terms of these conditions. *Traffic Rules and Conditions.*" Then follow the conditions of which the fourth is the only one with which we are now concerned, which concludes with the words "animals are only carried in conformity with this notice."

The fourth condition is:—"In case of all animals and goods for which a contract note with two rates of carriage shall be offered to the customer, the Company give him the alternative of adopting either rate: at the *full* rate, which will be charged when the contrary is not expressed, the Company undertake the ordinary duties of carriers for hire, subject to the conditions printed hereon and their statutory rights; at the *reduced* rate the Company carry at owner's risk, and exempt from all liability not occasioned by the wilful misconduct of their servants acting within the scope of authority. . . . Horses are usually conveyed in horse-boxes, but the Company will consent to convey them in waggons at rates lower than the horse-box rates, provided the consignor by assenting to these conditions agrees to limit the claim on each horse, in case of default by the Company, to a sum not exceeding ten pounds sterling. Animals are only carried in conformity with this notice."

This condition plainly offers to the customer his choice of either of the two rates of "carriage," either the *full* rate with the liability of the defendants, or the *reduced* rate—he taking all liability on himself except the wilful misconduct of defendants'

(1) Railway and Canal Traffic Act, 1854, s. 7.

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servants. The terms "carriage" in the first line and "carried" in the last line of this condition comprise, in my opinion, the whole of the carrier's duty in receiving, forwarding, and delivering the animal—covering the entire transaction and the whole period of time from the commencement of the receipt of the animal by the defendants until its delivery by them to the consignee. This, I think, is made more clear by the words "conveyed" and "convey" in this condition, which are used in reference only to the vehicle in which, as part of the contract of carriage, the animal will be forwarded by the defendants. I therefore think that it was mutually understood by Creighton and by the defendants by their servants, at the time of the delivery of the animal to and its receipt by the defendants, that the receiving, forwarding, and delivering the horse by the defendants was on the terms of the special contract to be signed when the horse was placed in the horse-box; that Creighton made his election as to the rate and liability, and, consequently, that no cause of action accrued to the plaintiff by the injury which occurred to the horse. In this view it is unnecessary to consider the argument founded on the way in and by which a cause of action once accrued may be released or discharged. For these reasons I think the verdict and judgment ought to be entered for the defendants.

HOLMES, J.:—

The plaintiff's horse was injured through negligence, not amounting to wilful misconduct, on the part of the defendants' servants while they were engaged in putting him in a horse-box at the Armagh station of the defendants' line, preparatory to his being conveyed to Dublin. The defendants rely for exemption from liability upon a special contract, signed by the plaintiff's groom, with full knowledge of its contents, and identical in language with a contract that was held by this Court to be reasonable in *Moore* v. *Great Northern Railway Co.* (1).

Under these circumstances, it seems to me that the case depends upon the construction of the contract. If it provides that the defendants shall not be liable for the negligence which is

(1) 10 L. R. Ir. 95.

the foundation of this action, the Judge ought to have directed a verdict for the defendants. If it does not, the verdict and judgment for the plaintiff ought to stand. The document in question is described in its heading as a notice of the conditions on which they receive traffic for conveyance; and its fourth paragraph declares, that, in case of all animals and goods, for which a contract note, with two rates of carriage, shall be offered to the customer, the Company give him the alternative of adopting either rate. At the full rate, which will be charged where the contrary is not expressed, the Company undertake the ordinary duties of carriers for hire, subject to the other printed conditions and their statutory rights. At the reduced rate the Company carry at the owner's risk, and exempt from all liability for injury not occasioned by the wilful misconduct of their servants acting within the scope of their authority. The ordinary duties of the defendants as carriers include, as is shown by the 7th section of The Railway and Canal Traffic Act, 1854, the receiving, forwarding, and delivering of animals without neglect or default; and the rate of carriage mentioned in the conditions is the remuneration paid for the services rendered by the Company in respect of all these duties. Can any other construction be given to the contract than that for the full rate they undertake the duty of receiving the animals and goods; and that, at the reduced rate, they are exempt from all liability in the performance of this as well as of all other duties? This is, I think, the necessary inference from the language of the paragraph to which I have referred; but all doubt is removed by the express words of the notice that precedes it, to which I have called attention already.

Now if both necessary implication and the express declaration oblige us to give this meaning to the written instrument, how is the matter affected by the circumstance that the special contract was not signed till after the animal had been received? It is neither illegal, unreasonable, nor unusual, for the terms of a contract to be reduced to writing after the performance of the services contracted for has been begun; and indeed I do not understand it to be argued that the period of signature in itself would make any difference in the interpretation to be placed on the document. But it is said that the knowledge that the animal

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had already sustained an injury either negatives the intention that the contract made was to apply to what had already happened, or makes a stipulation, which otherwise would be reasonable, unreasonable. Now, as far as intention is concerned, I am bound in the first place to look at the language used, and I cannot impute an intention inconsistent with its plain and unequivocal meaning. In truth the arguments based upon intention and unreasonableness are interdependent, and may be treated together; as the ground for suggesting that the rational construction of the document is inconsistent with the intention is that the result would be to make the contract unreasonable. But in what does the unreasonableness consist? If it be not unreasonable for an owner to select the lesser rate with all the consequences when the damage is contingent, and may, if it arises at all, be great or small, it is surely not unreasonable when he knows that some damage has been sustained, has witnessed the circumstances that led to it, and is able to form an opinion as to the amount of his loss, and the liability of the Company. In this case the groom, after and notwithstanding the wound received by the horse, determined to carry out the intention with which he had brought it to the station, and proceeded to book it. He is handed a document that tells him that if he pays the full rate, the Company shall undertake the ordinary duties of carriers in regard to both the receiving, the carriage, and the delivery of the animal, but that he has an option to pay a lower rate, on the terms that the Company shall be free from liability in connection with the performance of the aforesaid duties. Might not the groom, having all the circumstances fresh in his memory, reasonably think that the injury will turn out to be so trifling, or that the liability of the Company is so doubtful, as to make it his interest to save the difference between the full and the lower rate, and be his own insurer?

There remains the argument dwelt on by Mr. Bates. He contends that at the moment of the injury a cause of action arose which could only be got rid of by a release, or by accord and satisfaction. The answer to this proposition is that the cause of action is to be looked for in all the circumstances of the case, not in part of them. If the groom had taken the horse away and

declined to book him, the plaintiff might have sued successfully. But he did not do so. He determined to complete the purpose for which he had come to the station, to finish the delivery, and to send the animal to Dublin, signing the contract note as incidental thereto; and whether the plaintiff is entitled to recover or not must now be determined upon a consideration of all those circumstances. For these reasons I concur in the judgment of the Court.

MADDEN, J., I concur.

A. E. R. J.

Appeal. 1895. April 26, 29. May 5.

The plaintiff appealed to the Court of Appeal (Walker C., Sir Peter O'Brien, L. C. J., Fitz Gibbon and Barry, L. JJ.).

O'Shaughnessy, *Q.C.*, and *Bates*, for the appellant.

Campbell, *Q.C.*, and *Meredith*, *Q.C.* (with them, *R. F. Harrison*), for the respondents.

Cur. adv. vult.

WALKER, C.

The facts in this case are hardly in dispute, though the inferences from them are.

The plaintiff's horse arrived at the station in charge of a groom, to be booked to Dublin. He was a man accustomed to such work, and clothed with full authority to contract for the carriage of the horse. The horse was brought into the Company's premises—on to the bank next the horse-box. An attempt was made to box him, with the assistance of a porter, and in the effort (I assume, as I am bound to do, by the Company's negligence), the horse's leg was hurt. There was then a discussion between the groom and porter, the horse being still on the bank, and the attempt was renewed and perfected.

It is plain there was no such break as would make the final act of boxing a separate transaction. The act of boxing was commenced, and it never was really discontinued, and it is wholly unlike the case of a horse brought away from the station and

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brought back again. The horse, then, being in the box, the groom went to the booking office and proceeded to book him. It is settled law that in a case exactly like the present, as decided in *Moore* v. *Great Northern Railway* (1), where the Company have two rates for customers, one a higher rate, with the assurance law liability attached to it, and another at a lower rate which, by its terms, protects from the negligence of the Company's servants, this latter contract is just and reasonable by reason of the existence of the alternative rate which the consignor may ask for and take if he likes. It is a question of law whether such a contract is reasonable, and not a question for a jury. The groom proceeded to enter into a contract for carriage, and he chose the lower rate with the incidents attached to it. It is said that though in an ordinary case this contract would have protected the Company from all negligence in relation to the carriage of the horse, it did not in the present, for various reasons, which I shall now state.

It was said the carriage had not commenced. Now, it is plain that "carriage" is a word which includes "receiving, forwarding, and delivering"—the words with which the Traffic Act of 1854 deals—and *Hodgman's Case* (2) is a distinct authority that the horse is received, for the purpose of being received, forwarded, and delivered, when it enters the Company's premises with a view to carriage, and here it was in the act of being boxed—a stronger case than *Hodgman's Case* on the point. The notice at the head of the contract points to the same thing.

Then, it is said, the contract only operates to protect from the date of its being signed, and that at that time an accrued injury existed; that this was a cause of action, and the parties cannot be presumed to have contracted in reference to it, and, as was said, release the cause of action.

But if the cause of action was negligence in the receiving, forwarding, and delivering—which are the equivalent of carriage—then we have only to see whether the contract signed was one which covered, as a matter of contract, all negligence accruing during all the carriage. That is a matter of law on the construc-

(1) 10 L. R. Ir. 95. Recognised by the House of Lords in 8 App. Cas. 706.
(2) 5 B. & S. 173.

tion of the document, and would be the same question whether the injury accrued during the act of boxing, or in the middle of the journey, if the contract in fact was signed after it.

The same question would arise if the groom (as he might) had taken his contract at the higher rate, viz. whether the injury in the boxing was covered, as a matter of construction, by the contract, and it would seem strange if it was not. It seems to me to be a begging of the question to say that this was a cause of action when the contract was signed, not covered by it, if in law and construction it did cover it the moment it was signed. Can it be said the groom had no authority to sign the contract because the horse was injured in the boxing previously? He had complete authority to contract for the carriage—either by freeing the Company from risk, or putting risk upon them. The degree in which he did that cannot, I think, detract from his authority.

It was also contended, and the point also occurred to myself at one stage of the argument, that the contract signed was unreasonable, because it protected from all past negligence. The answer is, I think, as the plaintiff had the option of taking a rate which would cover the accrued injury, and for what appeared to him good consideration, he chose to take the lower rate; we must assume he did this voluntarily, and that there was no fraud or compulsion on the Company's part. Therefore, the accrued injury was a common factor in both. It only comes to this, that the plaintiff in the events that happened acted imprudently in taking the lower rate. Suppose he thought the horse really was not injured; or suppose that there had been negligence which was the cause of an injury but not then developed: I do not think we can alter the signed contract as to reasonableness by the facts that turned out. I by no means say that the existence of the alternative would make the terms of every signed contract just and reasonable. But I say that as this contract covers the actual carriage, including the boxing, during which the negligence occurred, the plaintiff, when he chose for consideration to abandon his right to a contract which would indemnify him from that negligence, and took one, for consideration apparently sufficient to him, which protected the Company from that negligence, is bound

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by it, and, in that respect, once the preliminary questions are disposed of, I think that the case is ruled by the principle of the decisions in *Moore* v. *Great Northern Railway Co.* (1); *The Manchester, Sheffield, and Lincolnshire Railway Co.* v. *Brown* (2), and *The Great Western Railway Co.* v. *M'Carthy* (3).

The appeal must therefore be dismissed.

SIR P. O'BRIEN, L. C. J.:—

The decision of this case, in my opinion, depends upon the answers we ought to give to two questions: 1st, Had the groom authority to make the special contract he did, in fact, make? 2ndly, What is the true construction and subject-matter of that contract?

It has not been controverted here, in the Court below, or at the trial, that the groom had authority to make the particular contract. The question then remains, What is its true construction? It was entered into with a full knowledge of the facts, without coercion or fraud; and it provides (a reasonable alternative having been offered) that the horse should be carried at the lower rate, and at the owner's risk. The obligation of the defendants was to carry at the lower rate with a correlative right that the risk of carriage, wilful misconduct of the servants of the Company being excepted, should be at the owner's risk. The obligation and immunity of the defendants were coextensive. What did carriage involve? It requires no case, no authority, to satisfy me that boxing a horse is in substance part of the carriage of a horse. It is, in my opinion, so necessarily and immediately connected with the carriage of the horse, as to form, in the eye of the law, part and parcel of the carriage of the horse. The risks attending the boxing of a horse are comprised within the risks of carriage of a horse. If authority were wanting, *Hodgman* v. *West Midland Railway Co.* (4) is a useful case. It shows that the receiving by a Company of a horse synchronises with the time he is brought upon the Company's premises, and carriage, in my opinion, covers receiving and forwarding. I am, therefore, of opinion that the special contract here affected the horse, so far as related to his carriage, from the time he came upon the Company's premises, to be

(1) 10 L. R. Ir. 95.
(2) 8 App. Cas. 703.
(3) 12 App. Cas. 218.
(4) 5 B. & S. 173.

carried to Dublin; but, *a fortiori*, the carriage of the horse commenced when an effort, though ineffectual, was made to box him. Now the injury complained of arose in the earlier stages of the boxing, and as this was covered by the terms of the contract, which provided that the carriage was at the owner's risk, no cause of action arose. It is a *petitio principii* to speak of releasing a cause of action; because the question, in my opinion, is whether any cause of action at all existed; and inasmuch as the carriage was at the owner's risk, and as I am of opinion the risks attending boxing were included within the risks of carriage, I have come to the conclusion that no cause of action arose.

In my judgment the determining consideration in the case is whether there was, so to speak, a new departure, a new beginning, when the groom declared after the accident he would send on the horse, whether what took place then affected the subsequent making of the contract in such a manner as to make its relation to the horse, and that at a time subsequent to the injury, relate, as it were, to a new subject-matter, viz. an injured horse. In my judgment what took place had not this effect. The groom only carried out his original intention. There was no real break in what I might describe as contractual intention. This intention became crystallised in the special contract. There was no reasonable evidence of such a new departure as would prevent the contract relating to the carriage of the horse when the first effort was made to box him. What was inchoate developed into what was complete, and the completed contract governs the transaction from the inception. I am, therefore, of opinion there was no cause of action, and that a verdict should have been directed for the defendants.

FITZ GIBBON, L.J.:—

When the groom signed the contract, in all probability he did not understand that he was parting with any right to hold the Company liable for what had previously happened. It may be, probably it is, the case that he did not realise the extent of the injuries at the time; he may have thought that they were trivial; or, feeling that he was to some extent to blame himself, he may have thought only of sending on the animal to the veterinary surgeon as soon as possible. But, whatever he thought, he did not

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reserve any claims which his principal, the plaintiff, might otherwise have had against the Company. He signed the written and printed contract; it binds his principal; there is no possibility of getting out of it; and the case becomes, therefore, one of construction.

On the construction of the document, I cannot hesitate to hold that the boxing of the horse was covered by its terms, especially having regard to the printed heading. The plaintiff received a consideration in paying only the lower rate. For this consideration, the defendants were exempted from liability for injuries covered by the contract, except any which might arise from the wilful negligence of their *employés*, and admittedly there was no wilful negligence here.

The transaction cannot be divided into two. It was one and entire. If we could separate the boxing of the horse from the carriage and delivery, then the Company would have got no payment at all for the boxing. They have received one payment, as the whole consideration to them, under a single contract, for their part in the entire transaction, which included receiving, boxing, carrying, and delivering the horse.

BARRY, L. J. :—

I have in this case the misfortune to differ not alone from the Judges of the Queen's Bench Division, but also from my colleagues here, and, that being so, it is unnecessary for me to say that I must feel very distrustful of my own opinion. Moreover, I must confess to a misgiving that my view of the law of the case has possibly been unconsciously influenced by the nature of the technical defence relied on by the Company, based upon the blunder of an ignorant groom, to defeat what a special jury have found, on the most satisfactory evidence, to be an honest claim.

The facts of the case are very brief, and they are very free from dispute. On the 11th December, 1893, the plaintiff's coachman brought this horse—a young animal of considerable value—to the station at Armagh for the purpose of having him conveyed to Dublin, consigned to a veterinary surgeon named Mr. Murphy, and by him (apparently as an act of obligingness) to be forwarded to the plaintiff Colonel Knox, then quartered at

Cork. I pass over the delay in the booking of the horse; nothing turns upon it from the way in which it was presented by the learned Judge to the jury. A porter of the defendants undertook to take charge of the boxing of the horse without the assistance of the coachman, and in the attempt to box the horse he was wholly unsuccessful, and the horse was most seriously injured (as the jury found) by the unskilfulness or negligence of the Company or the Company's servant, through either the structure of the box, or the management of the horse in the attempt to box him. There was during this argument, and I believe at the trial an endeavour made to establish that the abortive attempt to box the horse was not due to any negligence of the Company, and to minimise the character of the injury; but the jury have found that the injury was caused by the Company's negligence, and the evidence that it was of the most serious character is wholly uncontradicted. While the horse was being put into the box one of his legs was permitted to slip down between the platform and the box, and the skin was literally torn away, exposing the leg bone from the hough to the fetlock. That accident of course absolutely suspended the boxing of the horse; and the coachman said he would make the Company responsible.

During the argument some doubt was thrown on the proposition that irrespective altogether of any effect of the subsequent special contract the plaintiff had a cause of action. That there was then and there vested in the plaintiff a cause of action I have no doubt.

The coachman was about to take away the horse, but was put in a very puzzling position. I assume that the instructions of the coachman were to send the horse forward by the reduced rate. The coachman, being in a very perplexing position, recollected that the horse was to be sent to the veterinary surgeon, and that immediately on his arrival in Dublin he would receive there the fullest attention which his wounded condition warranted, and he resolved to send him on. The horse was then successfully, though in the injured state, put into the box, and the coachman went and booked the animal at the lower rate, and signed the usual docket, at the same time giving distinct notice to the booking clerk that the horse had been already injured. At the trial the counsel for

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the defendants asked the learned Judge to direct a verdict for the Company, first, on the ground that there was no evidence of negligence; secondly, on the ground that by the terms of the special contract, signed by the coachman, the Company was exempt from liability unless for wilful misconduct of the Company's servants.

There was no evidence of any wilful misconduct, and that special defence was withdrawn from the consideration of the jury altogether. But the learned Judge left the entire question of negligence to the jury, and the jury found that there was negligence in respect of the original abortive attempt to box the horse, and awarded the moderate sum of £25. That verdict was set aside in the Queen's Bench Division, and it appears on one ground alone, viz. that the right of action was absolutely excluded by the ignorant blunder of the coachman in signing the owner's risk docket. If that be the law the law must prevail. I think there is no director in that Company who, if it was his own private case, would have raised that defence. However, that contention was sanctioned by the learned Judges of the Queen's Bench Division, and has been sanctioned by my colleagues in this Court on the ground—to state it in a simple form—that the whole series of events from the time of the arrival of the horse within the precincts of the station at Armagh, until the delivery to the veterinary surgeon in Dublin, was all one transaction, undivided and indivisible. On that point great stress has been laid upon the case of *Hodgman* v. *The West Midland Railway Company* (1). In my opinion that case has no bearing upon the point which arises in this case. All it decides is that under sect. 7 of the Railway and Canal Traffic Act, a Company are not liable for more than £50 damages for an injury occurring to a horse in the course of its being received by or delivered to the Company, although no complete delivery has taken place. On the facts of this case no such question arises, or could arise, as there was a clear delivery to and receipt by the Company of the animal. That case also was decided on the words of the section, and such words are not in the "reduced rate" docket, but that is, perhaps, immaterial.

(1) 5 B. & S. 173.

I am of opinion, and it is the foundation of my judgment in the case, that the train of events did not constitute one transaction from the entrance of the horse into the station up to the delivery in Dublin; I think that the series of events is divided into two by a barrier of an insuperable character, *i.e.* the coming into existence of a new cause of action, namely, the injury done to the horse by the negligent attempt to box him. When the animal was extricated from the position in which the poor brute was placed, and raised again on his legs on the platform, there was a cause of action vested in the plaintiff which could not be taken from him except by release, or accord and satisfaction. Release is out of the question; it could not be contended that the signing of the docket was a release. I pass by altogether the point that there is on the record no formal plea of accord and satisfaction, but was there accord and satisfaction in fact? What is accord and satisfaction? How would it be pleaded here? Only to this effect, "that, whereas, in trying to box a certain horse of the plaintiff, which was brought to the defendants' premises for carriage, the defendants negligently injured the said horse, and the plaintiff being desirous to send the horse to Dublin, in consideration that the defendants would carry the said horse at the reduced rate, plaintiff agreed to forego and surrender all claim on account of the injury done to the horse." But can any such interpretation be given to the docket here? Is there evidence of any such agreement? What evidence is there of authority of the coachman to make such agreement? It is said that the language of the document is *prima facie* sufficient to cover the whole period of the transaction. Be it so, but it is a well-known principle in the construction of contracts, that for the purpose of applying the instrument to the facts, and determining what is the subject matter, evidence is admissible of every material circumstance that enables the Court to identify a person or thing mentioned or referred in the instrument. I admit, if you like, that the contract of carriage was, in a sense, inchoate from the reception of the horse on the premises. But, the continuity and unity was terminated by the injury to the horse, which gave a cause of action to the plaintiff, which remained vested in him, whether he sent on the horse or not. The Lord Chancellor has

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said, and I think the Lord Chief Justice has said "that there was no break," but I think that there was a material break by the creation of a new and distinct liability. I place no weight on the period of the transaction at which the contract was signed. I rely on the total change of circumstances, and the change of subject matter of the contract. It was, in form, a contract at the risk of the owner, to send to Dublin a horse, up to delivery to the Company admittedly uninjured, but by the misconduct and negligence of the Company, the subject matter was changed, and it had became a contract to forward an injured horse, in respect of which a cause of action had become vested in the plaintiff. It is not the "break" in time which makes the difference, it is the intervention of the injury through which there sprang into existence an independent cause of action. Suppose the coachman had taken the horse home again, and did not send him on till next morning, what would have been the effect of signing this contract note then? Would the circumstances make the signing of the document, and the sending of the horse different in law from what we have here? I cannot see that it would. But could it be held that the signing of the contract, and the sending of the horse on the 15th December, would exempt the defendants from liability for their negligence on the 14th? I think, certainly not. In my opinion the chain of events was broken by the intervention of the injury, and the contract was a contract to carry the injured horse, but did not exempt the Company from liability for the injury which, previously to the contract, they had inflicted on the animal. I think the verdict should stand.

Solicitor for the plaintiff: *Best.*

Solicitors for the defendants: *Crawford & Lockhart.*

G. Y. D.

NICHOLSON, Tenant; TRUSTEES OF THE MARQUIS OF HEADFORT, Landlords.

Land Com. 1896. Jan. 15, 16,

Appeal. June 3, 1[illegible]

Landlord and tenant—Land Law (Ireland) Act, 1887—Land Law (Ireland) Act, 1881—Pasture holding—Holding let to be used mainly for purpose of pasture.

A holding of nearly 200 acres was demised in 1877 to a trustee, who was a salesmaster, and who was, out of the profits of the land, to reimburse himself the expenses he might incur as such lessee. The lease contained a covenant not to erect, except with license of the landlord, any farmers' or labourers' dwellinghouses, or other messuages, a covenant to consume on the premises all hay and straw to arise thereon, and a covenant to labour, crop, and farm the premises in a husbandlike manner in respect of the succession of crops, and so that at all times there should be at least 140 acres under grass. The holding had, ever since the date of the lease, been used as a pasture farm, and there were no farm buildings on the lands:—

Held, by the Court of Appeal (reversing the decision of the Land Commission), that the holding was not let to be used mainly or wholly for the purpose of pasture.

Appeal by the tenant against the decision of a Sub-Commission, dismissing the application to fix a fair rent of a holding. The facts are fully stated in the judgment of Mr. Justice Bewley.

Gordon, Q.C., and *Jefferson*, for the tenant.

Teeling, Q.C., and *Hamilton*, for the landlord.

Bewley, J.:—

Jan. 16.

The holding in this case consists of the townland of Boolies, in the county of Meath, containing 199a. 2r. 27p. statute measure, and is held under a lease dated the 15th January, 1877, made by the Marquis of Headfort to Peter Heney for a term of 31 years, at the yearly rent of £229 12*s.* 4*d.* Mr. Nicholson, the present tenant, is an extensive landowner, having in his own hands from 2700 to 3000 acres of land surrounding, or in the immediate vicinity of the present holding; and his family residence is in Balrath demesne, which is separated from Boolies by an inter-

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vening field in his possession, and by a public road. The tenant's application to a fix a fair rent was objected to by the landlord on two grounds: (1) that the holding was let to be used mainly for the purpose of pasture; and (2) that it is demesne land; and the originating notice was dismissed by the Sub-Commission on the first of these grounds (1). The lease under which the lands are held contained, *inter alia*, covenants by the lessee not to assign, underlet, or set in con-acre, the demised premises, or any part thereof, without the license and consent in writing of the lessor, his heirs or assigns, first had and obtained; not to build, or permit or suffer to continue built or erected on the demised lands or any part thereof, any farmers' dwelling-houses, labourers' houses, or any cottage, cabin, hut, or other messuages whatsoever, except such as he should, from time to time, be expressly authorised to build or erect, or permit to be built or erected, by the license and consent in writing of the lessor, his heirs or assigns; to spend and consume on the demised premises all the hay, straw, and chaff that should arise thereon; and to labour, crop, and farm the premises in a good and husband-like manner in respect to the succession of white and green crops, and so that in no case two white crops should be taken in succession, and so that at all times during the demise there should be at least 140 acres of the premises under grass. The lease, which appears to be in the ordinary printed form then in use on the Headfort estate with certain blanks filled in, does not show the purpose of the letting, and the purpose (if any) must be sought in this case, as in many others, outside the terms of the contract of tenancy.

In and prior to the year 1868 the holding was in the tenancy of Mr. Robert Nicolls, under a lease which apparently did not contain any covenants restrictive of tillage, or letting in con-acre. Mr. Nicolls lived on an adjoining holding on the Nicholson estate called Rafeehan or Anchorage, and appears to have derived his interest in the residential holding and in Boolies, the holding now before the Court, from his uncle, Mr. John Brady. There is nothing in the lands of Boolies to render them unsuitable for tillage. About thirty, or thirty-five years ago, in Mr. Brady's

(1) 29 Ir. L. T. R. 143.

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time, a considerable portion appears to have been tilled from time time, but after Mr. Nicolls went into occupation, the holding was used as a pasture farm down to the year 1868. In or about that year Mr. Nicolls became mentally afflicted and incapable of attending to matters of business. His wife, Mrs. Sarah Nicolls, took upon herself the management of Boolies farm, and, being sorely pressed for money, she, with the advice of Mr. Cornelius Gavan, who acted as her manager, broke up about 18A., Irish Plantation Measure, of the lands for the purpose of letting them in con-acre. About 13A. were let for con-acre oats. The remainder was sowed by Mrs. Nicolls with oats, which was afterwards offered for sale on the foot by a local auctioneer. In the following year the same fields were let for con-acre by auction, and were sowed with oats. In the next year, 1870, the same lands were under green crops, and in 1871, they were let by auction for con-acre oats. Grass seeds were sown by Mrs. Nicolls with the oats, and in the following year these lands were meadowed by her. Other fields, containing about 22A., were let for con-acre oats for the season of 1872. All this tillage was of an exceptional nature, and for a special purpose.

In 1871, Mr. Nicolls' interest in Rafeehan, otherwise Anchorage, came to an end, and it was taken up by Mr. Nicholson. It is on the opposite side of the public road to Balrath demesne, and like all the neighbouring lands of which Mr. Nicholson obtained possession, it was retained by him in his own hands. In the same year the lease of Boolies expired, and in the month of November, 1872, an ejectment for the recovery of the land was brought by the Marquis of Headfort. Mr. and Mrs. Nicolls had then left the county of Meath, and gone to reside permanently in Dublin. Judgment in the ejectment was obtained on the 18th January, 1873, and on the 20th March, 1873, possession was obtained by the landlord, under a writ of *habere*. Notwithstanding these proceedings, Mrs. Nicolls appears to have been allowed to go into possession of the holding pending negotiations for a lease, and eventually the lease of 15th January, 1877, was executed to Mr. Peter Heney, a well-known salesmaster, as a trustee for her. By a declaration of trust dated the 7th February, 1877, to which the Marquis of Headfort became subsequently a consenting

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party, it was agreed and declared that Peter Heney, his executors, administrators, and assigns, should stand possessed of the premises demised by the lease upon trust for Sarah Nicolls for her sole and separate use, free from the control of Robert Nicolls, and of his debts and engagements; and it was further declared and agreed that Peter Heney, his executors and administrators, should and might, out of the rents, issues, and profits of the lands and premises, retain and reimburse himself and themselves all costs, charges, losses, damages, and expenses which he or they might suffer, sustain, expend, disburse, or be put to by reason of his acceptance of, or execution of, the lease, or otherwise in relation thereto, or to the trusts thereof.

From the date of the eviction until the farm was purchased by and assigned to the late Mr. Christopher A. Nicholson in the month of September, 1883, it was used exclusively as a pasture farm, and was managed by Mrs. Nicolls' herd. There are no farm-buildings of any kind on the holding, nor any building except a small thatched cottage, and, con-acring being now prohibited, it could not, without the erection of suitable buildings, be used for any purpose except as a grass farm. Under the terms of the lease all hay grown should be consumed on the premises, and therefore without buildings the farm should be used as a pasture farm. Mr. Bailey, the Legal Assistant Commissioner, who presided over the hearing of the case by the Sub-Commission, seems to have been of opinion that under the terms of the covenant the lessee was prohibited from erecting any kind of building, but, in my opinion, the restriction only applies to buildings in the nature of a messuage or dwelling-house, and the lessee might erect farm offices without violating the covenant. This, however, appears to me not to be a matter of any great importance.

With considerable hesitation I have formed the opinion that the circumstances connected with the granting of the lease lead to the conclusion that the letting must necessarily have been made mainly for the purpose of pasture. When the lease was executed the beneficial tenant was a married woman living in Dublin, with no prospect of returning to live in the neighbourhood of the holding. For four or five years prior to the granting of the lease

she had been working the farm as a pasture farm with the aid of a herd. She does not appear to have had any capital to erect farm buildings, even if offices without a suitable house for a steward or manager, could have enabled the lands to be used as a tillage or mixed farm. The trustee to whom the lease was made, and who made himself personally responsible for the payment of the rent for a term of thirty-one years, was a salesmaster in large business, who would naturally think that the holding should be used for the purpose for which in its then state it was best suited—namely, the feeding of cattle or sheep. It would appear also from the evidence, that owing to the quantity of rabbits and game on some of the adjoining lands on the Nicholson estate, great damage might be done to any corn crops on Boolies. That the lessee should stipulate for permission to break up a substantial part of the holding was only reasonable. Not only may a certain amount of tillage be required for purposes ancillary to pasture, but Mr. Edward Sclater, Mr. Nicholson's agent, has proved that a considerable part of the holding was originally laid down so badly, that it requires to be broken up and tilled in order to be laid down properly.

On the whole, I have come to the conclusion that the evidence shows that the holding was let by the Marquis of Headfort, and taken by Mr. Peter Heney, as a trustee for Mrs. Nicolls, for the purpose of being used as a pasture farm. Being of this opinion, the second question that was raised is of minor importance. It is right, however, to state that we are of opinion that the lands are not demesne. The lands, undoubtedly, were not demesne at the time the Land Act of 1881 came into operation, and assuming (which, however, I am by no means prepared to admit), that it was possible for Mr. Nicholson to convert the lands into demesne within the meaning of the Land Acts after his purchase in 1883, I do not think that anything that has occurred has had that effect. The lands have not been thrown into, or incorporated with lands undoubtedly demesne, as in *Pratt* v. *Gormanstown* (1), *Burrowes* v. *Colles* (2), *O'Ferrall* v. *Quirke* (3), and other similar cases.

On the first ground, however, I am of opinion that the order

(1) [1894] 2 Ir. R. 279, 557. (2) 28 Ir. L. T. R. 41. (3) [1895] 2 Ir. R. 197.

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of the Sub-Commission dismissing the originating notice was right, and should be affirmed.

Appeal. June 3, 17.

The tenant appealed to the Court of Appeal (Lord Ashbourne, C., and FitzGibbon and Walker, L.JJ.).

Gordon, Q.C., and *Jefferson*, for the appellant:—

The good husbandry covenant gives the tenant an "ambulatory" right to break up, in round numbers, any 60 out of the entire 200 acres. *M'Cormick* v. *Loftus* (1) is distinguishable, because (*a*) there the position of the acres to be cultivated was defined, and (*b*) the land was ancient pasture at the date of the lease. Here the evidence shows that there was no ancient pasture at the date of the lease. The judgment of Bewley, J., gives no weight to the husbandry covenant, but seeks the purpose of the letting in the user of the land; but it is only where the contract is silent as to the purpose that the user is to be looked at in ascertaining the purpose of the letting. Here the contract is not silent; the covenant shows that it was in the contemplation of the parties that the lands might be tilled to a substantial extent.

Teeling, Q.C., and *F. P. Hamilton*, for the respondent:—

In order to ascertain the purpose of the letting the lease must be dealt with as a whole. It was made to a trustee who had active duties to perform. The trustee was a grazier who could and would use the holding for pasture. The *cestui que trust* was living at a distance. The provision as to consuming the hay, straw, &c., on the premises shows that any tillage which the parties had in contemplation was only to be ancillary to the use of the holding for pasture. The restriction on erecting buildings points in the same direction. The very wording of the covenant for good husbandry, on which the appellant relies, affords evidence that the main purpose of the letting was for pasture. It does not show that the

(1) [1894] 2 Ir. R. 465.

parties contemplated tilling 60 acres. It is a provision that 140 acres, at least, should be under grass. The wording of the covenant in this respect is of importance, because it shows the point of view from which the lease was drawn up.

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Even if the purpose of the parties, that this was to be a pasture holding, is not to be found in the terms of the contract, it is at least a case where the contract is silent as to the purpose. Then the Court is driven to ascertain the purpose from the user, and the user shows plainly that the only purpose in the contemplation of the parties was pasture.

Cur. adv. vult.

June 17.

LORD ASHBOURNE, C.:—

This is an appeal from the Land Commission, and involves somewhat the same question as *Hanlon and Fay* v. *Bor* (1), in which we have just given judgment. The holding, which is situated in the county Meath, contains 199 acres 2 roods and 27 perches. It is held under a lease, dated January, 15, 1877, and made by the Marquis of Headfort to Mr. Peter Heney, a well-known salesmaster. The lessee's interest under that lease was assigned in 1883 to Mr. Nicholson of Balrath, who, in this case, fills the function of tenant, and demands the protection afforded by the Legislature to persons clothed with that status, claiming to have the fair rent of the holding fixed by the Land Commission.

The lease contains (amongst others) a covenant by the lessee not to build "any farmers' dwellinghouses, labourers' houses, or any cottage, hut, or other messuages," except with the consent of the landlord in writing—a covenant "to consume on the demised lands all the hay, straw, and chaff that shall arise thereon"—and a covenant to labour, crop, and farm the demised premises in a good and husbandlike manner in respect of the succession of crops, and so that at all times there shall be at least 140 acres under grass. The lessee thus has liberty to till almost 60 acres—a substantial portion, amounting to nearly one-third of the entire holding; and in this respect the case presents features similar to

(1) Not reported.

Appeal. 1896.

NICHOLSON, *Tenant;* HEADFORT, *Landlord.*

Lord Ashbourne, C.

those presented by *Hanlon and Fay* v. *Bor* (1), where the tenant could break up 30 out of 100 acres.

In all cases where it is alleged by the landlord that the letting was made mainly for the purpose of pasture, and the tenant contends that the holding was demised as a mixed farm, in the first place we must look at the lease itself, to see if it discloses what the purpose of the letting was. If there is any ambiguity or uncertainty in the information afforded by the lease, or if it be wholly silent as to the purpose, then it is open to us to look at the surrounding circumstances as showing what must have been present to the minds of the parties at the date the letting was made, and as explaining their intention and purpose. This lease, by the covenant I have referred to, in clear and unmistakable language, gives the right to the tenant to till nearly one-third of the holding. Are we to look outside the lease, away from this covenant, to extrinsic facts, to collect that in the mind of the parties this holding was let to be used mainly for the purpose of pasture? Would not this be to admit evidence not to explain but to contradict the plain intendment of the lease?

It has been said that the tenant has not availed himself of his powers, and that the land remains in his hands unbroken. No undue weight should be given to this circumstance. Under the lease he has a right to break up 60 acres in any year. Can it be urged that he has lost this right because he has not yet availed himself of his option?

It must be borne in mind that the *onus* in cases of this kind rests upon the landlord, who seeks to shut his tenant out of the benefits conferred by the Land Acts.

Mr. Justice Bewley, with considerable hesitation, formed the opinion that the circumstances connected with the granting of this lease led to the conclusion that the letting was made mainly for the purposes of pasture. Giving due and proper weight to the terms of the written contract between the parties, I am unable to agree with this conclusion. I am of opinion that the provisions by which the lessor bound himself show that the demised premises were given to the lessee to use as a mixed farm, and that therefore the decision of the Land Commission must be reversed.

(1) Not reported.

FITZGIBBON, L. J.:—

It is not possible to distinguish this case in result from *Hanlon* v. *Bor* (1), though it adds one more instance to those in which persons who, popularly speaking, would seem to be outside the policy of the Land Acts, have, in the words of my Brother Barry, "successfully posed as oppressed tenants." The purpose of the tenant in acquiring the holding, in such a case, might be well ascertained from his position and circumstances; but such considerations are not specified in the statutes as tests of exclusion, and in this case Mr. Nicholson is only an assignee, and was not a party to the original letting, the purpose of which is in question. The insurmountable difficulty in the landlord's way is that nothing can be admitted to qualify or contradict the evidence of the purpose of the letting as expressed or necessarily implied by the contract; and, beyond doubt or ambiguity, this lease shows that a purpose of tillage to a substantial extent, though under restrictions, was present to the minds of the parties when they executed it.

The tenant covenants "to labour, crop, and farm the said premises in a good and husbandlike manner, in respect to the succession of white and green crops," and it is declared that the landlord makes the lease "in full confidence, and upon the express condition and understanding that the lands shall be *cultivated*, *cropped*, and managed, after the manner, and according to the terms laid down." The only question therefore is, whether the restrictions upon cropping prove—and the *onus* lies on the landlord—that the lands were let to be used wholly or mainly for the purpose of pasture. Even if the restrictions upon building could be held to extend beyond dwellinghouses, and to apply to farm buildings, which I doubt, the condition of requiring the landlord's consent might be reasonable enough. The restriction against removal of hay, straw, or manure is really an agricultural covenant, of which the purpose is to secure good husbandry. It not only appears in English precedents of agricultural leases, but substantially the same restrictions appeared in *Drought* v. *Stubber* (2), *Holmes* v. *Lauder* (3), and *Westropp* v. *Elligott* (4); while the quantity of

(1) Not reported.
(2) 18 Ir. L. T. R. 37.
(3) 22 L. R. Ir. 47. [319.
(4) 9 App. Cas. 815; 14 L. R. Ir.

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land which might be tilled, namely, 60 acres out of 200, is very much greater than in any of those cases—far less than the amount of tillage which would make the farm, as a whole, "a mixed farm." In short, the terms of the lease show that the purpose of the landlord (on whom, I repeat, the *onus* rests) was, not that the farm should be used wholly or mainly for pasture, but that it should be treated in a husbandlike manner, by a tenant who, within the prescribed limits, might use it, at his option, for either pasture or agriculture; and the purpose and the powers of the tenant must be correlative with the purpose and stipulations of the landlord, as evidenced by the contract.

It is needless to repeat that in this case, as in *Hanlon* v. *Bor* (1), there is no physical unfitness for tillage in the subject-matter. The reasons for preferring grazing to tillage are economical, not natural or contractual. No doubt, the actual user in this, as in all the cases in which it has hitherto been attempted to exclude the tenant from the Land Acts, has been wholly or mainly for pasture;—otherwise, in fact, the question could not have arisen—but the actual user cannot control the express or implied terms of the contract of letting.

The holding consists of a large farm belonging to Lord Headfort; and though it is surrounded by the estate, and wholly or mainly by the demesne land, of Mr. Nicholson, and was, no doubt, taken by him on that account, it was never turned into demesne land by him, nor incorporated with his demesne, as was the case in *Pratt* v. *Gormanstown* (2).

An observation made by the Lord Chancellor in *Holmes* v. *Lauder* (3) applies even more forcibly to the present case. The lease was made after the Act of 1870, and expressly refers to that Act for the purpose of excluding money paid by a purchaser from the personal representatives of a deceased tenant from sect. 7 of that Act, yet it does not purport to bring the letting within any of the statutory exceptions.

WALKER, L. J., concurred.

Solicitor for the tenant: *R. A. Beauchamp.*
Solicitor for the landlord: *J. C. Sullivan.*

G. Y. D.

(1) Not reported. (2) [1894] 2 Ir. R. 279, 557. (3) 22 L. R. Ir. 47.

RE THE CASTLEISLAND RAILWAY. RE ROBERT FITZGERALD, SECRETARY OF THE GRAND JURY OF THE COUNTY OF KERRY, AND A CERTAIN PRESENTMENT OF THE GRAND JURY OF THE COUNTY OF KERRY, PRESENTING THE SUM OF £400, TO BE PAID TO THE GREAT SOUTHERN AND WESTERN RAILWAY CO. (1).

Q. B. Div. 1896. June 8, 12.

Railway Company—Grand Jury—Guaranteed dividend—Auditor's certificate —"Net profits"—"Net receipts respectively in each half year applicable to the payment of" guaranteed dividend—Outstanding liabilities—The Castleisland Railway Act, 1872 (35 *Vict. c. vii.*)—*The Castleisland Railway Amendment Act*, 1874 (37 & 38 *Vict. c. xxv.*)—*The Great Southern and Western Railway (Additional Powers) Act*, 1879 (42 & 43 *Vict. c. xciv.*).

The Castleisland Railway Company was formed in 1872 with a capital of £25,000, under 35 Vict. c. vii., amended by 37 & 38 Vict. c. xxv., by which, for thirty-five years after the opening of the line, "the net profits of the railway . . . after payment of the gross working expenses, and the interest payable, if any," on moneys borrowed under these Acts, should be "applied to the payment of dividend equally on the" whole paid up share capital of the Company; and whenever "the net profits from the railway, after making the payments before mentioned" should not amount to 5 per cent. per annum on the paid-up share capital, the amount required to make up such dividend on £16,000 (portion thereof) should become payable half-yearly by the barony of Trughenackmy. Provision was further made for the appointment of an auditor, who should from time to time, in a certificate in writing, "ascertain and determine the amount of net receipts respectively in each half year applicable to the payment of the said dividend on the said sum of £16,000," and should also "assess and determine the amount, if any, necessary to be made up and paid by the said barony."

In 1879 (by 42 & 43 Vict. c. xciv.) the undertaking was transferred to and vested in the Gt. S. & W. Railway Co.; but (by sect. 23) the baronial guarantee under the earlier Acts remained nevertheless in full force.

For the half year ending October, 1895, the undertaking (which had previously been worked at a loss, and showed in the revenue account a debit balance from former half years of over £5000) produced a net profit over working expenses of £115 9*s.* 1*d.* The auditor, in his certificate, applied this

(1) Before SIR P. O'BRIEN, C.J., and O'BRIEN, JOHNSON, and HOLMES, JJ.

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surplus in reduction of the outstanding debit brought forward in the revenue account, and declared the guaranteeing barony liable to contribute the full dividend on the guaranteed portion of the share capital. By direction of the going Judge of Assize the Grand Jury of the county formally presented this amount, and now, through their secretary, applied to the Court for a writ of *certiorari* to remove and quash the certificate and the presentment founded thereon, on the ground that the surplus of receipts over expenditure for the particular half year was applicable, so far as it would go, towards the payment of the guaranteed dividend for such half year in ease of the guaranteeing barony. The Railway Company showed cause :—

Held, that the auditor had acted rightly in bringing forward into the account for the particular half year the outstanding balance from former half years, and that the conditional order must be discharged.

CERTIORARI.

Motion on behalf of the Great Southern and Western Railway Co., to allow the cause shown by them, and to discharge the conditional order, obtained by R. Fitzgerald, secretary of the Grand Jury of county Kerry, to remove and quash the certificate of the auditor, Mr. Soady, by which he had certified, in regard to the accounts of the Castleisland Railway for the half year ending 31st October, 1895, that the net profits of the undertaking were nil, and that, accordingly, the full dividend on the guaranteed portion of the share capital of the undertaking should be paid by the barony of Trughenackmy, in said county, pursuant to the statutory guarantee ; and cross motion.

Ronan, Q.C. (*E. Morphy* with him), for the Grand Jury.

Matthew J. Bourke, Q.C., and *W. M. Jellett*, for the Railway Co.

Morphy, in reply.

The material facts, and the sections of the private Acts of Parliament, appear fully in the judgments.

June 12.

SIR P. O'BRIEN, L.C.J. :—

The question which we have to decide in this case is one of considerable importance, and arises in this way. The gross revenue of the Castleisland Railway for the half-year ending the 31st October, 1895, amounted to the sum of £680 4*s.* 10*d.* The

amount expended in working and maintaining the line during the same period came to £564 15*s.* 9*d.*, which, being deducted from the gross revenue, left a surplus of £115 9*s.* 1*d.* Now, the auditor, who was appointed pursuant to the Castleisland Railway Acts of 1872 and 1874, in auditing and balancing the accounts of the Railway, and ascertaining the sum to which the barony of Trughenackmy was liable by reason of a statutable guarantee by virtue of the said Acts, applied the surplus of £115 9*s.* 1*d.* in reduction of a sum of £5760 9*s.* 1*d.*, which represented a balance at the debit of the net revenue of the Company, being a general indebtedness, contracted not in one half year or in one year, but the aggregate of the various balances at the debit side of the revenue account for several years. In fact, the year 1895, in which there was a surplus over the cost of maintenance and working expenses of the line, was a red letter year, or rather half year, in the history of the Company. By the system adopted by Mr. Soady, the auditor, the surplus in question was, so to speak, made to disappear in reduction of the general indebtedness of the Company; and he did not deal with it as a fund applicable for the payment of dividends in ease of the guaranteeing barony.

By the Act of Parliament the capital of the Company was £25,000, and dividends on £16,000 of this were guaranteed by the barony of Trugenackmy. The account, according to Mr. Soady's system, stood in this way:—Gross revenue, 31st October, 1895, £680. Expended in working and maintaining the line in the same period, £564 15*s.* 9*d.* Surplus in half year, £115 9*s.* 1*d.* Then, in the general revenue account, there was a balance from former years at a debit of net revenue to the extent of £5760 9*s.* 1*d.* Deducting from this the surplus for the half year ending October, 1895, the reduced balance of debit to the net revenue account is £5645.

Upon this application of the net surplus of £115 9*s.* 1*d.*, there remained no fund for the payment of dividends, and, accordingly, Mr. Soady, the auditor, declared by his certificate, that the net receipts from the Castleisland Railway for the half year ended 31st October, 1895, applicable to the payment of the said dividend amounted to nil; that the dividend upon the said guaranteed capital amounted to the sum of £400, and that the

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last-mentioned sum, viz. £400, should be paid by the barony of Trughenackmy, in the county of Kerry, for the half year ended 31st October, 1895.

This application of the net surplus of £115 9*s.* 1*d.* was challenged before the Lord Chief Baron, at the last Assizes for the county Kerry. The circumstances are fully stated in the affidavit of Mr. Fitzgerald, the secretary for the Grand Jury, which was made for the purposes of the present motion. After referring to the Acts of Parliament which authorised the construction of the railway, the formation of the Company, and the creation of the capital of the Company, £25,000 in all, and stating that, in round numbers, a sum of £9000 of this was raised by the issue of ordinary shares, that dividends on the balance of £16,000 were secured by guarantee on the Barony of Trughenackmy, and that by statute the undertaking, subject to the provisions of the Act of 1874, had become vested in the Great Southern and Western Railway, he refers to the appointment of Mr. Soady as auditor, and states—"The Grand Jury, being advised and being of opinion that the surplus on the half year of revenue, over the expenses of making and maintaining the line, should have been applied in reduction of liability of the barony for the dividend guaranteed on the £16,000 for the half year ended the 31st October, 1895, objected to pass the presentment for the full sum certified, and brought the question before the Right Hon. the Lord Chief Baron, at the March Assizes for the county of Kerry, when his Lordship, while expressing his own opinion that the certificate of the auditor was properly made out, had the presentment passed in a form which embodied the certificate of the auditor, so that the question might be raised, and decided in this Honourable Court." "I am advised," he continues, "that there is good ground for contending that the surplus found by the auditor for the half year ended 31st October, 1895, is properly, under the provisions of the Act of Parliament, applicable to the payment, *pro tanto*, of the dividend on the sum of £16,000 for the said half year, in relief of the liability of the barony of Trughenackmy." Then he prays for a writ of *certiorari* to remove and quash Mr. Soady's certificate, dated 1st February, 1896, and the presentment founded thereon, with a

view to their amendment, and concludes by stating, "that the question intended to be raised is one of great importance, as a number of guarantees have been given by the county in respect of railways constructed in this county which involve large payments every year in which similar questions may from time to time arise."

Is the contention of the Grand Jury well founded? We think that it is not, and that the action of Mr. Soady was right throughout. A very formidable difficulty is opposed at the very threshold of the argument to the contention of the Grand Jury. If the surplus of the half year ending in October, 1895, should be, as they contend, applied in reduction of the guarantee of the barony, what would be the result? This, upon the true construction of the Act of 1874, to which by section 23 of the Act of 1879 we are referred, would be the result: an insolvent Company would be paying its shareholders dividends. That is to say, if the surplus was to be applied in reduction of the guarantee, the only way in which it could be so applied would be so as to reduce the amount of dividend secured by the guaranteeing barony. The only way the amount of dividend could be reduced would be by applying the net surplus towards a payment of a portion of it, thus allowing shareholders to take precedence of the creditors of the Company. This is such an unreasonable proposition that we naturally expect to find no statutable sanction for it; nor, indeed, is there any such sanction to be found; and it is to be observed, that if this proposition was well founded, dividends would be paid, not alone on the portion of the capital guaranteed, but also on the unguaranteed portion—on the £16,000 and £9000, respectively—for the 13th section of the Act of 1874 provides that the net profits shall be applied to the payment of the dividend equally on the whole share capital of the Company, amonuting to £25,000—a result which deprives the argument that guaranteed shares stand in an exceptional position of all force.

But is there any statutable sanction for the contention of the Grand Jury? We think not. The matter is governed by three sections of the Act of 1874—the 13th, 15th, and 16th sections. The 13th section provides, by reference to the 15th section, for the

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method of the ascertainment of the net profits, and for their application. They are to be ascertained as afterwards directed in the Act of Parliament, that is, in the 15th section; and, if they exist, they are to be applied, after discharging the gross working expenses, in payment equally of dividends on the entire capital of the Company—the concluding portion of the section providing for the payment of dividend by the barony on £16,000 of the capital of the Company in case the net profits, after making the prescribed payments, do not amount to a sum equal to a dividend at the rate of £5 per cent. per annum on the paid up capital of the Company. I do not think that there is anything in that section to limit the expression, "net profits," to those arising in any particular half year. The Lord Chief Baron, in his judgment at the Assizes, said that the 13th section refers to net profits generally, as distinct from net profits arising during any particular half year, and I agree with the Lord Chief Baron in that expression of opinion. But this becomes, I think, clear by reference to the 15th section, which directs how the net profits are to be ascertained. It provides for the ascertainment of the net profits of the railway, if any, "*applicable to the payment of interest as aforesaid.*" The natural and ordinary meaning of the expression "applicable to the payment of interest," means surplus of net profits after liquidation of indebtedness: and the method in which the prescribed half yearly account is kept by the Company does not at all militate against this view. The half-yearly account of expenditure and receipts is to be made out and presented to the auditor, and to be examined by him; and the concluding portion of the section provides that the Company "shall, so long as the barony contribution shall continue, keep proper and correct books of account to show the receipts and profits on the railway, and the expenditure thereof, to which books of account the said auditor or auditors shall have at all reasonable times access, . . . and such auditor or auditors shall adjust and balance such accounts." This is precisely what Mr. Soady did. The books of account showed a general indebtedness to the extent of £5760 9*s.* 1*d.* on foot of the net revenue with which these books were conversant; for there was no limitation of time as regards those books, and Mr. Soady struck a balance by applying the

surplus of the half year ending in October, 1895, in reduction of the general indebtedness. The account referred to in the middle of the 15th section, which the Company was to make out and tender to the auditor, was only an element, though an essential one, in the balancing of the general accounts referred to in the concluding portion of that section.

There remains the 16th section of the Act of 1874, which provides that the auditor shall ascertain the amount payable by the barony. It enacts that, after the opening of the railway, the auditor shall from time to time ascertain and determine the amount of net receipts respectively applicable to the payment of said dividend on the said sum of £16,000, "and shall also assess and determine the amount, if any, to be paid and made up by the barony liable to pay the same; and shall set forth the several matters so ascertained and determined by him or them in a certificate in writing under his or their hands. . . ." Here, as in the 15th section, the words are, "the amount of net profits *applicable to the payment of said dividend.*" This is the all-important expression which elucidates and determines the meaning of the Legislature. No doubt, there is the expression "in each half year"; but nevertheless there would be no fund applicable to the payment of dividends unless the general indebtedness of the revenue account was discharged. In liquidation, *pro tanto*, of this indebtedness, Mr. Soady, in our opinion, rightly applied the surplus of £115 9*s.* 1*d.*, and rightly declared the barony liable to the full sum of £400. The whole matter rests upon the Act of 1874, and it is not, in my opinion, necessary to refer to any of the authorities which were cited. This motion for a writ of *certiorari* must accordingly be refused.

O'BRIEN, J.:—

I concur in the view which the Lord Chief Justice has expressed, but not so much upon the terms of the Act of Parliament—the Act of 1874 and the other Acts referred to—as upon the disturbance of all general principles of account, whether between a railway company and its shareholders, or a guaranteeing area, if the principle here contended for by Mr. Morphy in his reply were to be adopted; for this would allow a large sum

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every year to accrue and remain outstanding to the creditors, while the balance might be paid to the shareholders from time to time, thus leaving the persons who in this way might not be satisfied, at the end of the period of thirty-five years, to bear a burden wholly inconsistent with the intention of the Act of Parliament, and depriving them of all advantages of their contract. Otherwise, I agree in the decision which the Lord Chief Justice has pronounced.

Johnson, J.:—

I concur in the result that the conditional order must be discharged. I regret that I have not had the advantage of seeing the Chief Baron's judgment at the Assizes, to which the Chief Justice has referred. It appears by affidavit that the balance of the debit account for expenses chargeable to revenue, accruing for some years, stood, for the half-year ending the 31st of October, 1895, at £5760 9*s.* 1*d.*; but, in the same half-year, the railway receipts exceeded actual expenditure by the net sum of £115 7*s.* 1*d.*, which, the Grand Jury of the county of Kerry contend, ought to have been applied by the auditor in relief of the baronial guarantee for that half year, and the Great Southern and Western Railway Company contend, is applicable (as the auditor has applied it) towards the discharge of the then balance of the revenue debt account.

The decision of the question depends on the construction of the Acts of 1874 and 1879, which have been so fully discussed. By section 23 of the Act of 1879, notwithstanding the amalgamation of the Castleisland Railway with the undertaking of the Great Southern and Western Railway Company, the baronial guarantee continues in force, and the provisions of the Act of 1874, "as to ascertaining the net profits of the railway and the half-yearly sum to be paid by the barony, shall remain in full force and effect."

We are therefore, for the decision of the present question, remitted to the provisions of the Act of 1874. By section 13 of that Act, for thirty-five years after the opening of the Castleisland Railway for traffic, "the net profits," ascertained as by the Act directed, after payment of the gross working expenses and interest

on borrowed money, "shall be applied to the payment of dividend equally on the paid-up part of the whole share capital" (£25,000), and, "if the net profits, after making the payments before mentioned, shall not amount to 5 per centum per annum on such paid up share capital, then the amount required to make up such dividend on £16,000 "—part of said share capital—"shall become payable half-yearly by the barony."

To arrive at this result we have then to see how is this account to be adjusted and "balanced." For this purpose section 14 provides for the appointment of an auditor, whose duties are prescribed by section 15, which defines the purpose of his audit, and the means supplied to him for the purpose. "For the purpose of ascertaining (*a*) the amount of the £16,000 expended before the opening of the railway for public traffic; (*b*) the half-yearly sum to be paid by the barony on the amount so expended; and (*c*) the net profits of the railway (if any) applicable to the payment of dividend as aforesaid"—that is, by reference to section 13;—for these objects, as soon as may be after the 1st of June and the 1st of December, respectively, the Company shall furnish to the auditor "a full, true, and distinct account of all the expenditure and receipts of every nature and kind for the preceding half-year ending the 30th of April and the 31st of October, respectively, arising in any manner from the railway." This account the auditor is to examine, with all books, papers, and documents under the control of the Company, which are to be produced for the purpose, and "so long as the barony contribution may continue, the Company shall keep proper and correct books of account to show the receipts and profits on the railway, and the expenditure thereof, to which books the auditor shall have access at all reasonable times . . . and such auditor shall adjust and balance such accounts."

By section 16 the auditor "shall from time to time ascertain and determine the amount of the net receipts respectively in each half-year applicable to the payment of the said dividend on the said £16,000," as provided by the Act, and assess and determine the amount (if any) necessary to be paid by the barony.

A half-yearly account which did not bring forward the balance (if any) from the preceding half-yearly account would not be, in

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my opinion, a true and accurate account. On examining the account for the half-year ending the 31st October, 1895, the auditor finds a debit balance on revenue account brought forward from former years of £5760, which the shareholders of the Company ought to discharge to their creditors before they can receive dividend or profit from the railway; but, as pointed out during the argument, the contention for the Grand Jury is that the shareholders of the entire share capital of £25,000 are, on their construction of the statute, to leave the debt of £5760 on foot of revenue account outstanding—admitted, but unpaid—and to divide amongst themselves £115, the surplus in one half-year of receipts over expenditure, as "*net profit applicable to the payment of dividend*," and that the baronial guarantee is payable only to the extent to which that dividend shall, on £16,000 (part of the share capital of £25,000), fall short of 5 per cent. I think the statute does not contemplate income applicable as profit for dividend to the holders of share capital who owe an outstanding debt chargeable to revenue account. "Expenditure for the preceding half-year," in section 15, comprises, in my opinion, all gross working expenses and interest on borrowed money: in other words, all expenses properly chargeable to revenue for which that half-year is liable, whether originally incurred in that half-year or legitimately and properly brought forward as debit to revenue from previous half years.

I therefore think that the auditor, in adjusting the accounts, was right in applying this sum of £115 7*s.* 1*d.* towards the discharge of the outstanding revenue debt, and not treating it as profit.

Holmes, J., concurred.

Solicitors for the Grand Jury: *Downing & Sons.*

Solicitors for the Great Southern and Western Railway Co.: *Barrington & Co.*

A. E. R. J.

DUNNE, TENANT; KNOLLES AND BABINGTON, LANDLORDS.

OTHERS, TENANTS; OTHERS, LANDLORDS (1).

Land Com. 1896. Oct. 27. Nov. 13.

Landlord and tenant—Agreement and declaration fixing fair rent—Filing in Court—Agreement on reinstatement of tenant—Commencement of statutory term—Application to fix judicial rent for second statutory term—Time for application—Land Law (Ireland) Act, 1881 (44 & 45 *Vict. c.* 49), *s.* 8 (6), (8), *s.* 20, *proviso* (2)—*Land Commission Rules* (1*st October*, 1881), 100, 102.

Where the landlord and tenant of a present tenancy not subject to a statutory term by writing agreed and declared, pursuant to section 8, sub-section 6, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), what was then the fair rent of the holding, and such agreement and declaration was subsequently filed in Court under that sub-section and Land Commission Rule (1st October, 1881), 102:—

Held, that the statutory term commenced from the rent day next succeeding, not the making, but the filing of the agreement and declaration; and, accordingly, that an application to the Court to fix the judicial rent of the holding for a second statutory term, made before the commencement of the last twelve months of a term of fifteen years from the rent day next succeeding such filing, could not be sustained.

The dates at which statutory terms commence in various cases of agreements fixing fair rents considered.

Semble—It was not competent for the parties by contract to alter the date from which the statutory term would run under the said Act.

IN these cases originating notices to have fair rents fixed for second statutory terms were served by the tenants, but the officers of the Land Commission declined to accept the same, on the ground that the applications were made before the last twelve months of the current statutory terms had commenced: Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 8, (8). The cases were accordingly placed in the Court list for argument.

The principal question was whether in the case of an agree-

(1) Before BEWLEY, J., and FITZ GERALD, Q.C., Commissioner.

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ment and declaration fixing the fair rent of a holding, not subject to a statutory term, under section 8, sub-section 6 of the Act, the first statutory term commenced to run from the rent day next succeeding the making, or that next succeeding the filing of the agreement and declaration.

The subsidiary questions arising in the several cases are fully stated in the judgment of BEWLEY, J.

T. M. Healy, *M'Cann*, and *A. Todd*, respectively, for the tenants.

P. D. Fleming, *Chambers*, and *J. W. Richards*, respectively, for the landlords.

The following were referred to: Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 8 (2), (3), (6), (8), s. 20, proviso (2); Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 47), ss. 4, 52, and Second Schedule; Land Commission Rules (1st October, 1881), 100, 102; *Kelly* v. *Enright* (1); *Beauclerk* v. *Hanna* (2); *Haire-Foster* v. *M'Intee* (3); *Woodside* v. *Massey* (4); *Givan* v. *Moffit* (5); *Conyngham* v. *Gallagher* (6); *Law* v. *Sinnamon* (7); *Church* v. *M'Poyle* (8) *M'Govern* v. *Peyton* (9); *Chaine* v. *Nelson* (10).

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In thirty-five cases listed for hearing before us on the same day, originating notices were served by the tenants of applications to the Court to fix the fair rents of their respective holdings, payable during a second statutory term, and in each case a question arose as to whether the application was not premature. In four cases no attempt was made to justify the institution of the proceedings, and the remaining thirty-one cases have now to be dealt with.

Section 8, sub-sect. (8) of the Land Law (Ireland) Act, 1881, provides, that during the currency of a statutory term an application

(1) 11 L. R. Ir. 379.
(2) 23 L. R. Ir. 144.
(3) *Ibid.* 529.
(4) 28 L. R. Ir. 604.
(5) 14 L. R. Ir. 252.
(6) 22 L. R. Ir. 614.
(7) 24 Ir. L. T. R. 9.
(8) 22 Ir. L. T. R. 85.
(9) 27 Ir. L. T. R. 138.
(10) 12 L. R. Ir. 272.

to determine a judicial rent shall not be made, except during the last twelve months of the current statutory term, and the question we have had to consider in each case is, whether the day upon which the originating notice was served was or was not within the last twelve months of the first statutory term. If it was prior to the last twelve months there is no jurisdiction whatever to entertain the application to fix a fair rent, and the originating notice must necessarily be dismissed.

In the majority of these cases the judicial rent was fixed by an agreement and declaration entered into and filed in Court under the provisions of sub-sect. (6) of sect. 8, of the Land Act of 1881, and the Rules made thereunder, and the right to maintain the present application depends on the date from which the first statutory term ran.

In some of the cases other questions arose which will be considered separately, but it will be more convenient to deal, in the first instance, with the question as to the date from which the first statutory term ran, where a judicial rent was fixed by an agreement and declaration in the precise form prescribed by Rule 100 of the Rules of the 1st October, 1881, filed in Court in the manner provided by Rule 102.

This question appears to me to depend wholly on the proper construction and effect of a few provisions of the Land Act of 1881. A statutory term is not an interest in land similar to the term granted by a lease. As stated by Holmes, J., in *Peyton* v. *Gilmartin* (1), "The legislation relative to the statutory term is based upon the continuance of the tenancy already existing, and does not involve the creation of a new tenure." A statutory term is, in fact, a period of time during which an existing tenancy is subject to certain incidents and conditions, and it is entirely a creature of statute. Under sect. 4 of the Land Act of 1881, where a landlord demands an increase of rent from the tenant of a present tenancy, or demands an increase of rent from the tenant of a future tenancy beyond the amount fixed at the beginning of such tenancy, then, where the tenant accepts such increase, until the expiration of a term of fifteen years from the time when such increase was made (in the Act referred to as a statutory term),

(1) 28 L. R. Ir. 378, at p. 393.

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such tenancy shall (if it so long continues to subsist), be deemed to be a tenancy subject to statutory conditions with such incidents during the continuance of the term as are in the Act mentioned. These incidents, and the statutory conditions, are set out in section 5, and are now well known. A tenant cannot, during the continuance of a statutory term in his tenancy, be compelled to pay a higher rent than the rent payable at the commencement of such term, and cannot be compelled to quit the holding of which he is tenant, except in consequence of the breach of one or more of the statutory conditions. Under sub-sect. (1) of sect. 8, the Court is empowered to fix, from time to time, the fair rent to be paid for a holding by a tenant of a present tenancy. A fair rent fixed by the Court is in the Act referred to as the judicial rent, and under sub-sect. (3), where the judicial rent of any present tenancy has been fixed by the Court, then, until the expiration of a term of fifteen years from the rent day next succeeding the day on which the determination of the Court has been given (in the Act referred to as a statutory term), such present tenancy shall (if it so long continue to subsist), be deemed to be a tenancy subject to statutory conditions, and having the same incidents as a tenancy subject to statutory conditions consequent on an increase of rent by a landlord (with a certain modification in respect to the landlord's right of resumption).

It will be seen, therefore, that under the provisions referred to the statutory term arises by the direct action of the statute, and by that alone. The acceptance of the increased rent in cases within the 4th section, or the fixing of a fair rent by the Court under the 8th section, brings it into existence, and the time at which it is to commence is fixed by statute, and not by contract between the parties or adjudication of the Court. Under sub-sect. (1) of sect. 8, the Court is merely a rent-fixing tribunal, and the fixing of a fair rent by the Court causes the existing tenancy to become subject to statutory conditions, and to have the incidents mentioned in section 5, for a period of fifteen years from the rent day next succeeding the determination of the Court.

A landlord and tenant may, by agreement, fix a fair rent of a holding without the aid of any statute, but sub-sect. (6) of sect. 8 provides the means by which the landlord and tenant of a present

tenancy to which the Act applies may fix a fair rent which shall be equivalent to a judicial rent, *i.e.* a rent fixed by the Court. The sub-section runs:—"Subject to Rules made under this Act, the landlord and tenant of any present tenancy to which this Act applies may, at any time, if such tenancy is not subject to a statutory term, or if the tenancy is subject to a statutory term, then may, during the last twelve months of such term, by writing under their hands, agree and declare what is then the fair rent of the holding, and such agreement and declaration, on being filed in Court in the prescribed manner, shall have the same effect and consequences, in all respects, as if the rent so agreed on were a judicial rent fixed by the Court under the provisions of this Act."

The filing in Court in the manner prescribed by the Land Commission Rules is essential to give the statutable operation to the agreement and declaration, and whether this filing is to be regarded as a judicial act of the Court, as seems to have been th view of the Queen's Bench Division in *Givan* v. *Moffit* (1) and of FitzGibbon, L.J., in *Evans* v. *Peyton* (2), or a penny-in-the-slot business, as irreverently suggested by counsel for the tenant in some of these cases, is not very important for the purposes of the matter under consideration. The mere filing or lodgment of a bill of sale in the Queen's Bench Division, under the Bills of Sale Acts, or of certified copies of a judgment and affidavit in the Registry of Deeds Office, under the Judgment Mortgage Act, has most important effects on rights of property; and under the section in question the filing of the agreement and declaration by the Court converts the contract fair rent into a judicial fair rent, with the effect and consequences in all respects of a judicial rent fixed by the Court. What are the effect and consequences of the fixing of a judicial rent by the Court? They are to be found in sub-sect. (3) already referred to.

"Where the judicial rent of any present tenancy has been fixed by the Court then until the expiration of a term of fifteen years from the rent day next succeeding the day on which the determination of the Court has been given (in the Act referred to as a statutory term) such present tenancy shall (if it so long continue to subsist) be deemed to be a tenancy subject to statutory conditions."

(1) 14 L. R. Ir. 252. (1) [1895] 2 Ir. R. 127, at p. 135.

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No *terminus a quo* is indicated by the section in respect of a statutory term arising where an agreement and declaration is filed except such as is to be ascertained by reference to sub-sect. (3), and the filing of the agreement and declaration, and that alone can, in my opinion, be treated as equivalent to "the determination of the Court." Until the agreement and declaration is filed the rent agreed on by the parties is in no sense a judicial rent. Neither statutory term nor judicial rent can come into existence before the date of filing, and there is nothing in the Act to antedate the commencement of the statutory term.

Church v. *M'Poyle* (1) was strongly relied on by counsel for some of the tenants in these cases as establishing that in the case of an agreement and declaration the judicial rent and statutory term commence to run from the rent day next succeeding the date of the agreement. But this case decided no such proposition. Under sect. 29 of the Land Law (Ireland) Act, 1887, relief was given to certain tenants whose judicial rents were fixed before the 1st January, 1886; and it was held in this case that where an agreement and declaration was executed in 1885, but not filed in Court until 1886, the rent for the purposes of this section was to be treated as having been fixed in 1885. The ground of the decision was that when the parties executed the agreement they decided the amount of the rent, having regard to the prices current at the time the agreement was entered into, and not with regard to what prices might be when the agreement came to be filed. The Lord Chief Baron did not enter into any consideration as to the time at which the statutory term would commence to run, but dealt with the date of the agreement—not the rale day next succeeding that date—as the period at which a judicial rent was to be considered as having been fixed for the purposes of sect. 29 of the Land Act of 1887. This is manifest from the judgment of the same eminent Judge in the case of *Conyngham* v. *Gallagher* (2) decided by the Court of Exchequer four months after the decision in *Church* v. *M'Poyle* (1). It was there held that where an appeal from an order of a Sub-Commission fixing a fair rent was heard and decided by the Land Commission, their decision is the fixing

(1) 22 Ir. L. T. R. 85. (2) 22 L. R. Ir. 614.

of a fair rent for the purposes of section 29 of the Land Act of 1887, though it merely be an affirmance of an order of the Sub-Commission. But, at page 617 the Lord Chief Baron says:—"I would not have any doubt upon the question if it arose solely upon section 29, or upon it in connexion with any other section in the Act of 1887, because I find nothing to qualify it there; but I think there was a very fair ground for Mr. Drummond's contention, because, upon the 8th section of the Act of 1881, it has been held, where a rent was fixed by a Sub-Commission, and afterwards either affirmed altogether or only varied in amount, that the fair rent must be taken to relate back to the commencement of the term of fifteen years from the rent-day next succeeding the day upon which the decision of the Sub-Commission was passed. That has been decided in *Davies* v. *M'Mahon* (1)."

That is to say, that although the statutory term in *Conyngham* v. *Gallagher* (2) ran from some date in the year 1883 the Exchequer Division considered that for the purposes of the special provisions of the 29th section of the Act of 1887 the judicial rent should be treated as having been fixed in 1886, the date at which the order of the Sub-Commission fixing the fair rent was affirmed by the Land Commission.

Counsel for one of the tenants in these cases relied on the fact that by the Land Act of 1896 the words "from the rent-day next succeeding the day on which the determination of the Court has been given" in sub-sect. 3 of section 8 of the Act of 1881 have been repealed. But such repeal can have no effect on the question arising in these cases. By virtue of sect. 38, sub-sect. 2, (*b*), and (*c*) of the Interpretation Act 1889 (52 & 53 Vict. c. 63), where any Act passed after the commencement of that Act repeals any other enactment then, unless the contrary intention appears, the repeal shall not, (*b*), affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or, (*c*), affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.

The rights and obligations of the parties landlord and tenant in these several cases were fixed, so far as the questions now before

(1) 24 L. R. Ir. 73, 447. (2) 22 L. R. Ir. 614.

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us are concerned, in 1882 or 1883, and the repeal of the paragraph referred to by the Act of 1896 cannot possibly shift back or alter the date from which the statutory term runs.

Reference was made to sect. 4 of the Act of 1896 as indicating that a statutory term is created by the signing of an agreement and declaration under the Act of 1881 ; but it could not be argued that a statutory term would come into existence if the agreement and declaration were not filed in Court, and this section does not touch the question as to the date from which the statutory term runs.

The suggestion that the Land Commission in some way might now fix the date from which the statutory term in these cases should run, cannot, I think, have been seriously made. The Land Commission has not legislative powers, and must only endeavour to interpret the existing law as best it can—not always an easy task. In my opinion, where an agreement and declaration entered into under sect. 8 of the Land Act of 1881 has been filed by the Court, the statutory term runs from the rent day next succeeding the filing, and not from any earlier date.

In the case of *Jeremiah Dunne* v. *Knolles and Babington*, however, an argument was founded on the special terms of the agreement and declaration which was dated the 30th March, 1882, lodged in the County Court on the 8th April, 1882, and apparently filed three months afterwards. The material parts were as follows :—" We hereby agree and declare that £69 9*s*. 8*d*. is now the fair rent of the above holding, and we apply to the County Court to file this agreement to the intent that the said rent of £69 9*s*. 8*d*. may be the judicial rent of the holding to be payable half-yearly on every 1st day of May and 1st day of November, the first payment to be made on the 1st day of May next."

This last provision it is contended, necessitates that the statutory term should run from the 1st May, 1882, even though the agreement and declaration was not filed until a later date ; and *Beauclerk* v. *Hanna* (1) has been relied on. But that case does not appear to me to support the contention of counsel. An agreement and declaration dated the 12th December, 1888, signed in

(1) 23 L. R. Ir. 144.

pursuance of a judgment of the Vice-Chancellor, declared that £24 was then the fair rent of the holding, and provided that such rent should commence from the 1st November, 1884, and it was filed by the Land Commission on the 17th December, 1888. Whether the statutory term as between the parties in that case must be treated as running from the 1st November, 1884, is a matter to be decided in the future, and I express no opinion on it now. In my opinion, the parties in Jeremiah Dunne's case did not attempt to alter the date from which the statutory term was to run in the ordinary course, but merely contracted that the rent of £69 9*s.* 8*d.* was to be the fair rent payable from the 1st May, 1882, and as this was the existing rent this stipulation did not entail any change in the relation of the parties. Though unnecessary, perhaps, for the decision of any of these cases, I may add that my present impression is that, prior to the passing of the Land Act of 1896, it was not competent for the parties by contract to alter the date from which the statutory term would run under the statute. Sub-section 7 of section 8 provides, amongst other things, that "an alteration of judicial rent shall not take place at less intervals than fifteen years," and an agreement that a statutory term would run from a date prior to the date of filing an agreement and declaration appears inconsistent with this. If a landlord and tenant in May, 1895, could enter into an agreement and declaration that a certain rent then agreed to be the fair rent of the holding should be deemed to be the judicial rent from the 1st November, 1881, and that the statutory term should run from that date, and the agreement and declaration was filed by the Court in August, 1895, proceedings to fix a fair rent for a second statutory term might be taken in November, 1895, and an alteration in the judicial rent would take place at an interval of a few months. This would, in my opinion, be plainly contrary to the express provisions as well as to the policy of the Land Act of 1881.

In four cases on the estate of Lord Templemore, agreements and declarations in the ordinary form, dated the 12th July, 1882, were filed by the Land Commission on the 25th October, 1882, but according to the affidavits of the tenants the fair rent fixed by the agreements was the rent paid in each case as from the 1st

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November, 1881. Under these circumstances it has been argued on behalf of the tenants that the statutory term must be treated as running from the 1st November, 1881. But, as I have already stated, the statute fixes the period from which the statutory term is to run, and the fact that the landlord, for some time prior to the fixing of the judicial rent agreed to accept a rent equal in amount to that ultimately fixed cannot alter the commencement of the statutory term.

In three cases on the estate of John M'Birney a different and important question arises. The tenants of these holdings, it is stated, were evicted immediately after the passing of the Land Act of 1881, but were reinstated a short time afterwards as present tenants, at rents then agreed upon between them and the landlord.

Sect. 20, sub-sect. 2, of the Act of 1881, provides that "Where the landlord has resumed possession of a tenancy from a present tenant he may, if he thinks fit so to do, reinstate such tenant in his holding as a present tenant; and thereupon such tenancy shall again become subject to all the provisions of this Act which are applicable to present tenancies.

"Provided always, that the landlord and tenant may at the time of such reinstatement agree on the rent to be paid by such tenant, and in such case such agreement shall have the same effect as if the rent so agreed on were a judicial rent fixed by the Court under the provisions of this Act."

Rule 100 of the Land Commission Rules of the 1st October, 1881, provided that where the landlord and tenant agree what is the then fair rent of the holding pursuant to sect. 8, sub-sect. 6, or sect. 20, sub-sect. 2 of the Act of 1881, they should enter into an agreement and declaration which might be in Form No. 33; and Rule 102 provided that the declaration and agreement should within one month after the date thereof be lodged with the Clerk of the Peace of the county, or with the Land Commission, as the case might be, and that the Clerk of the Peace or Land Commission should file the same at the expiration of three months from the lodgment thereof, if no notice of objection to the filing thereof should have been in the meantime received.

Agreements and declarations in the prescribed form were

entered into by the landlord and tenants in these three cases in the months of February and April, 1882, and were duly lodged with the Clerk of the Peace of the county of Monaghan, and subsequently filed in Court. For the reasons fully stated by me at Cork on the 5th December, 1895, in the case of *M'Carthy* v. *Warmington* (1), and at Belfast on the 17th December, 1895, in the case of *Graham* v. *M'Naghten* (2), it is not in my opinion essential that an agreement as to the rent of a holding on the reinstatement of a tenant under sect. 20, sub-sect. (2), should be in writing, or if in writing, should be filed in the manner prescribed by the Rules. There are therefore grounds for contending that in the cases referred to, if the facts stated are established in evidence, a judicial rent came into existence at the dates of the agreements, and not at the dates at which they were filed. If this be so, the applications would not be premature, and under these circumstances I am of opinion that these three cases should proceed in the ordinary way.

In five cases the judicial rent was fixed by a Sub-Commission in the months of July or August, 1882, and as the cases were not recorded, *i.e.* the applications were not made to the Court on the first occasion on which it sat, the judicial rent and statutory term ran from the 29th September, 1882, the rent day next succeeding the order fixing the rent. But the originating notices to fix the judicial rent for the second statutory term were served in the month of August last, and the proceedings were therefore brought too soon.

The originating notices in all the cases except the three on the estate of John M'Birney must be dismissed on the ground that the applications were premature. In a large number of these cases the tenants are now in a position to serve originating notices to fix a fair rent for a second statutory term, and it is to be regretted that they did not wait for a short time longer before commencing proceedings.

Solicitors for the tenants: *M. Healy*, *D. C. Rushe*, *Henry Murphy*, and *J. Alexander*.

Solicitors for the landlords: *R. Ashe*, *M'Kee*, and *Reeves & Sons*.

D. M'C. M.

(1) 29 Ir. L. T. R. 149. (2) Not reported.

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ABSOLUTE GIFT—*Followed by gift over of property undisposed of—Will—Construction—Estate* pur autre vie *— Power of sale—Election — Disclaimer.*] *B.*, who was possessed of a house in Stephen's-green, Dublin, held under a lease for three lives, by his will dated the 27th May, 1833, devised to his eldest son, *J. R. B.*, his house in Stephen's-green, with all the furniture therein (excepting such articles as his wife might select to take to Ballymacool), his pictures, books, private books of prints, coins, wines, and everything contained therein, except plate and linen, he paying the rent thereof, and in case that his said son *J. R. B.* should not think proper to occupy or keep his said house, he might be at liberty to sell the same, together with (if he thought proper) the pictures, coins, wines, &c.; but it was the testator's wish that his books should not be sold, but remain in his family; the amount of the sale to be applied to his own use and benefit; and in case his eldest son *J. R. B.* should die without having a family before he should have sold the said house, the testator devised the house in the same manner to his second son *W. B.*; and in case he should so die, the house was to be sold, and the proceeds divided among his daughters. The testator died in 1836, and *J. R. B.* entered into possession. He died in 1890, having by his will devised all his property to the defendant, who entered into possession of all the property except the house in Stephen's-green, Dublin. By deed poll, dated the 16th March, 1895, the defendant disclaimed the interest in this house. In an action against the defendant for arrears of rent of this house:—*Held* (affirming the judgment of the Queen's Bench Division, from which Johnson, J., dissented on the question of construction), that *J. R. B.* took the house absolutely under the will of the original testator, and not for life only, and that it was not

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ARRANGING DEBTOR—*Statute of Limitations—Common Law Procedure Amendment Act* (*Ireland*), 1853 (16 & 17 *Vict. c.* 113, *s.* 20)—*Assenting creditor—Failure to pay composition—Action for original debt—Implied promise to pay.*] A debtor carried an arrangement with his creditors, whereby his creditors were to accept a composition for their debts, payable by instalments. The first of these instalments was not paid. Five years afterwards the plaintiff, an assenting creditor who had proved in the arrangement (a period of more than six years having elapsed since his debt originally accrued), commenced an action for that debt:—*Held*, by the Queen's Bench Division (Harrison and Gibson, JJ., *diss*, and Gibson, J., withdrawing his judgment), and by the Court of Appeal, that the plaintiff was entitled to judgment; that there was implied in the arrangement a promise on the part of the arranging debtor that, in case he failed to pay the composition at the time agreed, he should pay the entire debt. *M'Donnell* v. *Broderick* - - - Q. B. 136; APP. 166

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year the outstanding balance from former half years, and that the conditional order must be discharged. *Re Castleisland Railway Co.*; *Re Fitzgerald (Secretary of Kerry Grand Jury) and Kerry Presentment* - - - - - - - Q. B. 661

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See LEGACY.

BONA FIDE TRAVELLER — *Purpose of journey—Licensing Acts*—37 & 38 *Vict. c.* 69, *s.* 28—*Public thoroughfare—Navigable arm of the sea.*] A navigable arm of the sea, though not crossed by a ferry, is a public thoroughfare within the meaning of the Licensing Act, Ireland, 1874 (37 & 38 Vict. c. 69), s. 28. A person is not a *bona fide* traveller within the meaning of the Licensing Acts when the object of the journey is to resort to a licensed public-house for the purpose of drink. *Parker, Appellant*; *Reg.* (*Walsh*) *Respondent* [Ex. 404

BOROUGH—Divisions of—Freeman franchise
See PARLIAMENT. 1. [326

BREACH OF COVENANT—Lease—Covenant by lessor to make a street within one year
See COVENANT. [247

BUILDING —Agreement authorizing landlord to take up possesssion for — Antecedent yearly tenancy - - - 190
See TEMPORARY CONVENIENCE.

CARRIERS — *Railway — Carriage of goods—Horse—Alternative rates—Condition relieving from liability—Contract made after injury.*] The plaintiff's horse was taken by his groom to Armagh railway station, to be sent to Dublin. A porter in the employment of the defendants tried to put the horse into a box, but failed in the attempt, and the horse slipped and received serious injuries. At the trial of the action the jury found that these injuries were caused by the negligence of the defendants, but not however amounting to wilful misconduct. The attempt to box the horse was afterwards successfully carried out. The groom then, after the injuries were done, signed a contract in writing for the carriage of the horse at the defendants' reduced rate, subject to conditions, one of which was:—"That at the reduced rate the Company carry at owner's risk, and exempt from all liability not occasioned by the wilful misconduct of their servants, acting within the scope of their authority." There was an alternative higher rate, under which the Company undertook the ordinary liabilities of carriers:—*Held*, by the Queen's Bench Division, and by the Court of Appeal (Barry, L.J., *diss.*), that the defendants were not liable. *Knox* v. *Great Northern Railway Company* - - - Q. B. 632; App. 641

2.——*Railway Company—Special conditions exempting from liability, except for wilful neglect or misconduct — Non-delivery of goods — Burden of proof—Obligation to feed animals during transit—Implied request*—41 & 42 *Vict. c.* 74, *s.* 33.] Pigs were delivered for carriage from Sligo to Manchester under a special contract at a reduced rate subject to a condition exempting the carrying Company from all liability (including liability for loss, injury, or delay), unless occasioned by the intentional and wilful neglect or misconduct of the Company's servants acting within the scope of their authority. On the lot arriving at Manchester some of the pigs consigned were not forthcoming. On the trial of an appeal in a civil bill action for the loss thus sustained by the consignor, the Company contended that on proof of the special contract they were entitled to a dismiss, without giving any evidence as to why or how the missing pigs were not delivered:—*Held*, on case stated by the Judge of Assize that this contention could not be sustained, and that the plaintiff on the facts proved was entitled to a decree. Where it is the custom of a Railway Company to feed animals consigned to them for carriage at the expense of the consignor during delay in transit, a request under the 41 & 42 Vict. c. 74, s. 33, will be implied, and the Company incurs liability for any loss occasioned by leaving the animals unfed. *Curran* v. *Midland Great Western Railway* (*Ireland*) *Company* Ex. 183

CASES—*Adnam* v. *Sandwich* (*Earl of*) (2 Q. B. D. 485) followed - - - - 410
See TITHE RENTCHARGE. 2.

—— *Ager* v. *Sealy* (27 Ir. L. T. 63) approved and adopted - - - - - 356
See VALUE OF TENANCY.

—— *Henderson* v. *Londonderry* (*Dean of*) (2 Cr. & Dix. 494) followed - - 442
See TITHE RENTCHARGE. 3.

—— *Millar* v. *Keane* (24 L. R. Ir. 49) approved of, and followed - - - - 267
See JUDGMENT.

—— *Moore-Smyth* v. *Devonshire* (Fishery Cases, June 17, 1871) disapproved of 40, 57
See FISHERY ACTS. 2.

—— *Pharmaceutical Society* v. *London and Provincial Supply Association* (5 App. Cas. 857) applied - - - - 394
See PHARMACY ACTS. 2.

—— *Reg.* (*Reeves*) v. *Inspectors of Irish Fisheries* (20 L. R. Ir. 155) disapproved of 40, 57
See FISHERY ACTS. 2.

—— — (*Marshall*) v. *Tyrone* (*Justices of*) ([1896] 2 Ir. R. 15) followed - - 318
See LICENSING ACTS. 2.

—— *Stevenson* v. *Parker* ([1895] 2 I. R. 504) distinguished - - - - 194
See SUBLETTING.

CAUSE OF ACTION—Accrued injury from negligence—Special contract—Exemption
See CARRIERS. 1. [632, 641

CERTIFICATE — Fishery Commissioners — Fixed net—Second inquiry—Mandamus *See* FISHERY ACTS. 2. [40, 57

—— Spirit grocer's license—Objection by police—Absence or withdrawal of - 15, 318
See LICENSING ACTS. 1, 2.

CERTIORARI — Civil bill decree — Renewal against executor *de son tort* - 436
See EXECUTOR DE SON TORT.

CHANGE OF RESIDENCE—Freeman 326
See PARLIAMENT. 1.

CHARITY—Bequest for masses—Public celebration - - - - - - 291
See MASSES.

—— Property used for charitable purposes—Rating - - - - - - 538
See RATES. 1.

CHEMIST—Pharmaceutical - 368, 394
See PHARMACY ACTS. 1, 2.

CIVIL BILL DECREE — Renewal against executor *de son tort* - - - 436
See EXECUTOR DE SON TORT.

CLAIM—Freeman—Change of residence 326
See PARLIAMENT. 1.

COLLIERY — *Valuation Acts — Principle on which valuation is to be made.*] The valuation, under the Valuation Acts, of rateable coal mines in Ireland is to be made upon the following principle, namely, upon an estimate of the net annual value thereof, *i.e.* the rent for which, one year with another, they might, in their actual state, be reasonably expected to let by the year, upon the terms of the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in their actual state, and all rates, taxes, and public charges, if any, except tithe rentcharge, being paid by the tenant. No allowance is to be made for sunk capital. Royalties paid are evidence of the letting value, but are not conclusive. *Commissioner of Valuation, Appellant; Clonbrock Coal Company, Respondents* - - - - - - - Ex. 560

COMMISSIONERS OF NATIONAL EDUCATION—Rules of—Training College *See* RATES. 1. [538

COMMISSIONERS OF PUBLIC WORKS—Advances—Compensation for improvements - - - - - - 29
See IMPROVEMENTS.

COMPANY—Carrying on business as pharmaceutical chemists — Penalty— Pharmacy (Ireland) Act, 1875, s. 30 - 394
See PHARMACY ACTS. 2.

—— Misrepresentation in prospectus - 496
See MISREPRESENTATION IN PROSPECTUS.

—— Railway.
See RAILWAY COMPANY.

COMPENSATION — *For improvements — For disturbance—Landlord and tenant—Landlord and Tenant (Ireland) Act,* 1870—*Land Law (Ireland) Act,* 1881—*Demesne land—Residential holding—Holding expressed to be let for temporary convenience—Letting for life of tenant.*] In an estate map made in 1814, the lands of Newtown, then held under a lease dated April 3, 1811, for thirty-one years or three lives, were described as "a handsome demesne," and in a map of the adjoining townland the lands bounding it on one side were called "Newtown demesne." The lessee in the lease of 1811 was described as "Esquire," but the parcels demised, which included other lands than those the subject-matter of the present case, were called "the ploughlands of Newtown and C." In 1852 the lands of Newtown, which had been for some time in landlord's hands, were let to O'L. for a term of thirty-one years, at a rent of £1 5*s.* per acre, under an agreement for a lease which was to contain usual husbandry covenants, with provisions that the tenant was to put and keep the house and premises in repair, and that the landlord was to have power to resume portion, not exceeding 10 acres, for building purposes. On O'L.'s death the holding passed to his widow as his executrix and devisee, and she remained in possession till her death, February 18, 1894. In 1883 the term of thirty-one years agreed to be granted in 1852 expired, and ejectment proceedings were brought by the landlord to recover the holding. The proceedings were defended, but the matter was settled by Mrs. O'L. agreeing to take a lease of the holding "as demesne lands only, for her own life," paying an increased rent of 5*s.* an acre free of county cess and taxes. The lands were always used as an ordinary agricultural farm. On the death of Mrs. O'L. the landlord required possession of the holding from her executor, who made a claim before the County Court for compensation for disturbance and improvements. The County Court Judge awarded compensation on both grounds. Both parties appealed to the Land Commission:—*Held,* by the Land Commission, that the lands were not demesne lands, nor a residential holding, nor a letting for temporary convenience, so as to exclude the holding from the benefit of the Land Acts, and that the executor of the deceased tenant was entitled to compensation for improvements and for disturbance. The landlord having appealed to the Court of Appeal:—*Held,* by the Court of Appeal, Walker, L. J., *diss.* (reversing in part the decision of the Land Commission), that the executor of the deceased tenant was not entitled to compensation for disturbance. *O'Donovan, Claimant; Earl of Kenmare, Respondent* LAND COM. 512; APP. 521

—— Improvements—Claim by Commissioners of Public Works - - - - 29
See IMPROVEMENTS.

CONDITIONS — Railway Company — Non-delivery—Negligence—Wilful misconduct —Burden of proof - - - 183
See CARRIERS. 2.

—— Railway Company—Special contract—Alternative rate—Accrued injury 632, 641
See CARRIERS. 1.

CONSENT—Sub-division of holding, 273, 286, [364
See SUB-DIVISION. 1, 2.

—— Subletting - - - - - - 194
See SUBLETTING.

CONSTRUCTION OF STATUTES—
See FISHERY ACTS. 1. [93, 418
FOREIGN MORTGAGE.

CONTINUING BREACH—Covenant to make street within a year - - - 247
See COVENANT.

CONTINUING OFFENCE—Penalty—Limit of time for recovery - - 93
See FISHERY ACTS. 1.

COSTS—Appeal for - - - - 267
See APPEAL.

—— Motion for judgment against executor—Successful defence of *plene administravit* —Assets *quando* - - - 267
See JUDGMENT.

COUNTY COURT—Decree—Renewal against executor *de son tort* - - - 436
See EXECUTOR DE SON TORT.

COVENANT—*By lessor to make a street within one year—Breach—Assignment of lessor's interest—Liability of assignee—Continuing breach.*] Lands described as bounded by a proposed new street were demised in 1872 to a lessee whose interest became vested in the plaintiff in the year 1888. By the lease the lessor covenanted to make the new street within one year from the date thereof. The lessor died in 1878. The trustees of his will and his executor assigned his interest in the reversion to the defendants. The street not having been constructed, the action was brought in 1892 by the plaintiff against the defendants for breach of the covenant to make the street within one year. *Held*, by the Court of Appeal, affirming the judgment of the Queen's Bench Division (Holmes and Madden, JJ., *diss.* O'Brien, J.) that the covenant was broken once for all when the year had elapsed and long before the plaintiff's title accrued, and that therefore the plaintiff was not entitled to recover. *Morris* v. *Kennedy* - - - - - - APP. 247

DECREE—County Court—Renewal against executor *de son tort* - - - 436
See EXECUTOR DE SON TORT.

DEMESNE LANDS - - - 512, 521
See COMPENSATION.

DISCLAIMER — Onerous portion of devised property - - - 571, 597
See ABSOLUTE GIFT.

DISMISSAL FOR WANT OF PROSECUTION—*Practice*—"*Proceeding*"—*Notice of intention to proceed*—*R. S. C.* (1891), *Order LXIV., Rule* 11.] A motion to dismiss for want of prosecution is not a proceeding within Order LXIV., Rule 11, so as to require a month's notice of intention to proceed "where there has been no proceeding for one year from the last proceeding had" in the action. *Warnock* v. *Mann* - - Q. B. 630

DISTURBANCE—Lease for life of lessee—Claim by executor - - 512, 521
See COMPENSATION.

DIVIDEND—Guaranteed—"Net profits" 661
See BARONIAL GUARANTEE.

DONATIO MORTIS CAUSA—*Deposit receipt —Suicide—Public policy.*] The owner of a deposit receipt gave the document to her sister under circumstances such that the jury found that it was so given in contemplation of death which was to be effected by suicide, and that the gift was to take effect only in the event of the donor's death. *Held* (affirming the decision of the Exchequer Division), that the gift under such circumstances did not constitute a valid *donatio mortis causa*. *Quære*—Can there be a valid *donatio mortis causa* when the donor at the time of the donation is in good bodily health? *Agnew* v. *Belfast Banking Company and Claney* - - - - APP. 204

DUTY—Revenue.
See REVENUE.

DWELLING-HOUSE — Landlord living on premises—Parliamentary franchise 497
See PARLIAMENT. 2.

EEL WEIR—Free gap - - - 93
See FISHERY ACTS. 1.

EJECTMENT—
See ACTION TO RECOVER POSSESSION OF LAND.

EQUITY OF REDEMPTION—Mortgage of—Rents—Garnishee - - 445, 453
See GARNISHEE.

ESTATE DUTY—Foreign mortgage - 418
See FOREIGN MORTGAGE.

ESTATE FOR LIFE—Superadded power of sale—Gift over - - 571, 597
See ABSOLUTE GIFT.

ESTATE PUR AUTRE VIE—Will—Construction—Absolute gift - 571, 597
See ABSOLUTE GIFT.

ESTOPPEL—Sub-division of holding—Right to have fair rent fixed - - - 364
See SUB-DIVISION. 1.

EVIDENCE—Burden of proof—Special contract —Carriers—Exceptions - - 183
See CARRIERS. 2.

—— Presumption—Lost instrument—Consent to subletting - - - - - 194
See SUBLETTING.

EXECUTOR—Letting for life of deceased lessee —Claim for compensation for disturbance *See* COMPENSATION. [512, 521

—— Successful defence of *plene administravit*—Motion for judgment—Assets *quando*—Costs - - - - - - 267
See JUDGMENT.

EXECUTOR DE SON TORT—*Of deceased defendant—Civil bill decree renewal—"Personal representative"—14 & 15 Vict. c. 57, ss. 9, 142—Certiorari—Discretion—27 & 28 Vict. c. 99, s. 9.*] In section 142 of 14 & 15 Vict. c. 57, the words "personal representatives" (of a deceased party to civil bill proceedings) do not include any but a rightful executor or administrator; and therefore there is no jurisdiction in a Civil Bill Court to renew against an executor *de son tort* a decree obtained against the person with whose assets he has intermeddled. Where a plaintiff in a Civil Bill Court obtained a renewal against an executor *de son tort* of a decree for more than £20, made against the deceased defendant, the Court, in the exercise of the discretion given by 27 & 28 Vict. c. 99, s. 9, refused to order a writ of *certiorari* to issue under that section to remove such renewal decree, so as to give it the effect of a judgment of the High Court. *Earl of Westmeath* v. *Coyne* [Q. B. 436

EXEMPTION—From duty - - 291, 418
See FOREIGN MORTGAGE.
MASSES.

—— From rates - - - - - - 538
See RATES. 1.

FAIR RENT—*Agreement and declaration fixing—Landlord and tenant—Filing in Court—Agreement on re-instatement of tenant—Commencement of statutory term—Application to fix judicial rent for second statutory term—Time for application—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 8 (6), (8), *s.* 20, *proviso* (2)—*Land Commission Rules* (1*st October*, 1881), 100, 102.] Where the landlord and tenant of a present tenancy not subject to a statutory term by writing agreed and declared, pursuant to section 8, sub-section 6, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), what was then the fair rent of the holding, and such agreement and declaration was subsequently filed in Court under that sub-section and Land Commission Rule (1st October, 1881), 102:—*Held*, that the statutory term commenced from the rent day next succeeding, not the making, but the filing of the agreement and declaration; and, accordingly, that an application to the Court to fix the judicial rent of the holding for a second statutory term, made before the commencement of the last twelve months of a term of fifteen years from the rent day next succeeding such filing, could not be sustained. The dates at which statutory terms

FAIR RENT—*continued.*
commence in various cases of agreements fixing fair rents considered. *Semble*—It was not competent for the parties by contract to alter the date from which the statutory term would run under the said Act. *Dunne, Tenant; Knolles and Babington, Landlords. Others, Tenants; Others, Landlords* [LAND COM. 671

—— Originating notice—Amendment — Acknowledgment of title - - - 82
See LIMITATIONS, STATUTE OF. 1.

—— Sub-division—Separate holding—Estoppel
See SUB-DIVISION. 1. [364

FEEDING ANIMALS—Delay in transit—Railway Company—Implied request
See CARRIERS. 2. [183

FILING—Fair rent agreement—Commencement of statutory term - - - 671
See FAIR RENT.

FIRM — Of legally qualified pharmaceutical chemists—Apprentice—Regulations 368
See PHARMACY ACTS. 1.

FISHERY ACTS—*Eel weir—Salmon weir—Free gap—Weir not extending more than half way across a river—Implied repeal of statute—Repeal by Statute Law Revision—Interpretation of Statute law.*] The respondents were owners of two eel weirs in the Shannon, which, in 1863, and since that year, had been without a free gap. It was admitted that neither weir extended more than half way across the river. In a prosecution before Justices under section 12, sub-section 1, of the Salmon Fisheries (Ireland) Act, 1863, for not making a free gap therein "within twelve months after the commencement of this Act" of 1863, the Justices dismissed the complaint on the ground that the offence under this sub-section was not a continuing one, and that the prosecution should have been brought within six months after the expiration of the twelve months limited by sect. 12, subsect. 1, of the Act. On case stated for the opinion of the Queen's Bench Division:—*Held*, that the offence mentioned in sect. 12, sub-sect. 1, of the Act of 1863, was a continuing offence, and was not, as contended, a complete offence at the expiration of the twelve months after the passing of the Act, and that therefore a prosecution could rightly be brought, against the owner for the time being, to recover the prescribed penalties incurred by him during the period (as limited by 13 & 14 Vict. c. 88, s. 50) of six calendar months preceding the date of the summons. *Held*, further, that sect. 41 of the Act of 1842 (5 & 6 Vict. c. 106) having been superseded and repealed, impliedly by sect. 9 of the Act of 1863, and in express terms by the Statute Law Revision Act of 1892 (55 & 56 Vict. c. 19), the provisions therein, by which its operation was confined to weirs "which extend more than half way across any river," could not be used to limit

FISHERY ACTS—*continued.*
the general application of the words "every fishing weir" in sect. 9 of the Act of 1863, so as to exclude from its operation those weirs which did not extend more than half way across the river. *Held*, further, that the Act of 1863 applied to eel weirs, and not to salmon weirs only, and that therefore, under section 9 of that Act, it was required that eel weirs should have a free gap in accordance with the regulations in that section. *Held*, further, that the provisions in sect. 9 of the Act of 1863, that the free gap should be "not less than one-tenth part of the width of the stream," must be construed as meaning one-tenth part of the width of that part of the stream which was intercepted between the extremities of the weir. *Massy Westropp* v. *Commissioners of Public Works in Ireland* Q.B. 93

2. —— *Fixed net condemned by Commissioners as illegal—Injury to navigation—"Legally erected"—New inquiry*—Mandamus—26 & 27 *Vict. c.* 114, *s.* 40—*Application to re-enter appeal.*] In 1863, on an inquiry before the Fishery Commissioners as to the legality of a fixed net at *D.* in the county of Waterford, the Commissioners held that the fixed net was illegal on the ground that title was not shown, and also on the ground that the net was injurious to navigation. In 1864, upon appeal by way of special case stated for the Queen's Bench, an order was made affirming the order of the Commissioners, so far as same decided that the fixed net was injurious to navigation and should therefore be abated, the Court not deciding the question of title raised. In 1893, *C.* (who was a minor at the date of the proceedings in 1863 and 1864) alleging that the injury to navigation had ceased, applied to the Inspectors of Irish Fisheries to hold an inquiry as to whether the weir was now injurious to navigation. An inquiry was held, and the Inspectors reported that the weir, if erected at *D.*, would not now be injurious to navigation, but declined to issue a certificate under the Salmon Fisheries Act, 1863, as the question of title raised by the special case had been left undisposed of by the Court of Queen's Bench. *C.* then applied to the Queen's Bench Division for an order for a writ of *mandamus* directed to the Inspectors to hold an inquiry into his title to use a fixed net at *D.*, or for an order commanding them to issue a certificate under the Salmon Fisheries Act, 1863, authorising him to erect a fixed net, or for an order that the appeal by way of special case stated might be reinstated for hearing as not finally disposed of:—*Held*, by the Queen's Bench Division and the Court of Appeal, that the application should be refused; that, the appeal having been finally disposed of by the Queen's Bench in 1864, all jurisdiction of the Court in regard thereto was spent; that the fixed net had been finally and conclusively condemned in 1864 as injurious to navigation, and

FISHERY ACTS—*continued.*
was not "legally erected in the open season of 1862"; and that no new inquiry was open. *Moore-Smyth* v. *Devonshire* (Fishery Cases, June 17, 1871) and *Reg.* (*Reeves*) v. *Inspectors of Irish Fisheries* (20 L. R. Ir. 155) disapproved of. *Quære:* Having regard to the provision of sect. 40 of the Salmon Fisheries (Ireland) Act, 1863, does *mandamus* lie to compel the Inspectors of Irish Fisheries to grant a certificate under that Act? *Reg.* (*Coghlan*) v. *Inspectors of Irish Fisheries* [Q.B. 40; App. 57

FIXED NET—Eel weir—Free gap - 93
See Fishery Acts. 1.

—— Order of Fishery Commissioners—Illegality—Appeal—New inquiry - - 40, 57
See Fishery Acts. 2.

FOREIGN MORTGAGE — *Revenue — Estate duty—Finance Act*, 1894 (57 & 58 *Vict. c.* 30, s. 2) *—Property situate out of the United Kingdom—Legacy Duty Acts, construction of—Implied repeal of earlier by later statute*—56 *Geo. c.* 56, *s.* 115; 5 & 6 *Vict. c.* 82, *s.* 2.] A testatrix domiciled in Ireland died possessed of mortgages on freehold property situate in the colony of Victoria and in Switzerland. The Finance Act, 1894, sect. 1, imposes on the property, real or personal, which passes on the death of a person dying after the commencement of the Act, a duty, called "Estate Duty." Section 2 (2) enacts that "property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." 56 Geo. 3, c. 56, s. 115 (Ir.), enacts that "the stamp duties from time to time imposed by law upon receipts for legacies or shares or proportions of any estate or effects, shall be deemed and taken to be chargeable and charged, and payable and paid, only in respect of such legacies as shall be payable out of estates and effects in Ireland." 5 & 6 Vict. c. 62, repealed the duties payable in Ireland under 56 Geo. 3, c. 56, and substituted the duties then payable in England under 55 Geo. 3, c. 184. The Commissioners of Inland Revenue having decided that estate duty was payable in respect of these mortgages, the executors presented a petition under the Finance Act, 1894, to have the question determined by the Court. It was contended on behalf of the executors that estate duty was not payable on two grounds: first, that the mortgages were immoveable property, situate out of the United Kingdom, and therefore not liable to legacy duty before the passing of the Finance Act, 1894; and, secondly, that the mortgages were "estates and effects" out of Ireland, and therefore exempt from duty under 56 Geo. 3, c. 56, s. 115, which

FOREIGN MORTGAGE—*continued.*
was still in force. It was contended on behalf of the Commissioners, first, that the mortgages were personal or moveable property, and therefore liable to legacy duty; and, secondly, that 56 Geo. c. 56, s. 115, was impliedly repealed by 5 & 6 Vict. c. 82:—*Held*, that the contention of the Commissioners on both points was correct, and that estate duty was payable. *Lawson* v. *Commissioners of Inland Revenue* - - - - - - - Ex. 418

FRANCHISE—Parliamentary.
See PARLIAMENT.

FRAUD—Misrepresentation in prospectus 496
See MISREPRESENTATION IN PROSPECTUS.

FREE GAP—Eel weir - - - 93
See FISHERY ACTS. 1.

FREEMAN—Change of residence—Notice of claim—Amendment of list - 326
See PARLIAMENT. 1.

GAP—Eel weir - - - - - - 93
See FISHERY ACTS. 1.

GARNISHEE—*Practice—Judgment—Mortgage of equity of redemption—Notice by mortgagee to tenants—Judicature Act*, 1877, *sect.* 28, *sub-sect* 5.] *A*, who was the owner of lands, mortgaged them by deed, first to *B*, and secondly to *C*, whose mortgage deed recited *B's* security, but, subject to *B's* rights, empowered *C* to enter into receipt of the rents and profits. *B* not having interfered, *C* served notice on the tenants to pay him:—*Held*, that a judgment against *A*, obtained after this notice, could not be enforced by a garnishee order against rents due by the tenants. *Campion* v. *Palmer* - - - Q.B. 445; APP. 453

GIFT OVER—In default of exercise of power of sale—Devise whether for life or in *quasi* fee - - - - - - 571, 597
See ABSOLUTE GIFT.

GRAND JURY — Presentment — Guaranteed dividends—Net profits - - 661
See BARONIAL GUARANTEE.

HOLDING—*Tenant of an undivided share of lands*—"*Parcel of land*"—*Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *s.* 57—*Redemption of Rent Act* (54 & 55 *Vict. c.* 57), *s.* 1.] The lessee of an undivided share of land is not the occupier of a "holding" within the meaning of the Redemption of Rent (Ireland) Act, 1891. *Diss.* Walker, C. Decision of the Irish Land Commission reversed. *Cummins, Lessee; St. Leger and others, Lessors* - - - APP. 603
—— Character of - - - 512, 521
See COMPENSATION.
—— Separate—Sub-division—Estoppel - 364
See SUB-DIVISION. 1.
—— Sub-division without consent—Void assignment - - - - - 273, 286
See SUB-DIVISION. 2.

ILLEGALITY—Fixed net - 40, 57, 93
See FISHERY ACTS. 1, 2.

IMPLIED PROMISE—Arranging debtor
See ARRANGING DEBTOR. [136, 166

IMPLIED REPEAL - - 93, 418
See FISHERY ACTS. 1.
FOREIGN MORTGAGE.

IMPLIED REQUEST—41 & 42 Vict. c. 74, s. 33 - - - - - - 183
See CARRIERS. 2.

IMPROVEMENTS — *Landlord and tenant—Landlord and Tenant* (*Ireland*) *Act*, 1870—*Compensation for improvements—Advances to tenants by Commissioners of Public Works—Claim by Commissioners against amount awarded as compensation to the tenant.*] A tenant from year to year of lands applied for and obtained from the Commissioners of Public Works, under section 31 of the Land Law (Ireland) Act, 1881, a loan of £375, to be expended in drainage and erecting farm offices, and executed a deed whereby he charged all his tenancy, estate, and interest in the lands with the payment to the Commissioners of the advances and interest. The tenant's interest was sold under a writ of *fi. fa.* to Brew and Glynn, who subsequently surrendered the tenancy to the landlord, and served a claim for compensation for improvements for £498 3*s.* 4*d.* The County Court Judge disallowed the claim. The claimants appealed to the Land Commission. The Commissioners of Public Works obtained leave to intervene, and, on the hearing of the appeal claimed to be mortgagees of the compensation moneys. The Land Commission awarded the claimants £237 10*s.*, compensation for improvements, but held that the claim of the Commissioners of Public Works to have a charge upon the amount so awarded was unsustainable:—*Held*, by the Court of Appeal (reversing the Land Commission) that the Commissioners of Public Works were entitled under their charge to the amount so awarded as compensation for improvements. *Brew and Glynn, Tenants; Stackpoole, Landlord* - APP. 29
—— Compensation for - - - 512, 521
See COMPENSATION.

INHABITANT OCCUPIER — Parliamentary franchise - - - - - 497
See PARLIAMENT. 2.

INQUIRY—Legality of weir—Previous decisions and appeal - - - - 40, 57
See FISHERY ACTS. 2.

INTEREST — Incumbrance — Vesting order — Purchase of Land Acts — Statute of Limitations - - - - 401
See LIMITATIONS, STATUTE OF. 3.

JUDGMENT—*Motion for on specially indorsed writ—Gen. Ord. XIV., Rule* 1—*Judgment against executor—Assets quando—Form of order—Costs.*] Where an executor successfully raises the defence of *plene administravit* on a motion for judgment, he

JUDGMENT—*continued.*
is, apart from misconduct, entitled to costs of the motion and action against the plaintiff; but the plaintiff is entitled to judgment against assets *quando* for his debt, with the costs of action and motion, also against assets *quando*. *Millar & Co.* v. *Keane* (24 L. R. Ir. 49) approved and followed. *Cockle* v. *Treacy*; *Ingham and Fallon* v. *Treacy* [App. 267
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LICENSING ACTS — *Certificate for spirit grocer's license—Application for—Absence of or withdrawal of objection by police—Beerhouses (Ireland) Act*, 1864 (27 & 28 *Vict. c.* 35) *ss.* 3, 4, 5—*Licensing (Ireland) Act*, 1874 (37 & 38 *Vict. c.* 69) *ss.* 9, 14—*Mandamus.*] The plaintiff applied to Justices at Petty Sessions for a certificate for a spirit grocer's license. The police officer objected, on the ground of the unsuitability of the surroundings; and the Justices refused the application on this ground. The Court of Appeal having held that this ground was illegal, a writ of mandamus issued to the Justices to rehear and determine the said application, and the case was re-entered and came on for hearing before the Justices. The

LICENSING ACTS—*continued.*
police officer withdrew the objection. The Justices, however, though the objection had been thus withdrawn, proceeded to examine witnesses, and made a return to the writ that they had duly reheard and determined the application, and had executed the writ by refusing the application on the ground of unsuitability of the premises:—*Held*, by Gibson, J., at the trial of the issue joined on the pleadings in answer to this return, and by the Queen's Bench Division (Sir P. O'Brien, L. C. J., and O'Brien, J.), that the order of the Justices and their return to the writ were bad, and that a peremptory writ of mandamus should issue to the Justices to grant the certificate.—*Held*, further, that the objection having been withdrawn on the adjourned hearing, without collusion or *mala fides*, and there being no objection before the Court, the duty of Justices, under 27 & 28 Vict. c. 35, s. 5, and 37 & 38 Vict. c. 69, s. 9, was merely to issue to the applicant the certificate to his good character and the suitability of the premises *Reg.* (*Marshall*) v. *Justices of Tyrone* - Q. B. 15

2. —— *Certificate for spirit grocer's license—Application for—No objection by police—Objection by other parties—Ground of objection disclosed by the applicant's own statement—Authority of Justices to ascertain the fulfilment of all conditions necessary to the exercise of jurisdiction—Power of adjournment—Beerhouses* (*Ireland*) *Act*, 1864 (27 & 28 *Vict. c.* 35), *ss.* 3, 4, 5—*Licensing* (*Ireland*) *Act* 1874 (37 & 38 *Vict. c.* 69), *ss.* 9, 14.] *M.* applied on notice to the Justices at Petty Sessions for a certificate for a spirit grocer's license, and, when the case was called, came forward and was examined by his solicitor. Then another solicitor present applied on behalf of two inhabitants of the district for leave, and was allowed, to cross-examine the applicant. There was no objection on the part of the police. On the applicant's own statement, and in answer to a question from the bench, as well as on such cross-examination, it appeared that the premises were unsuitable. The bench refused to grant the certificate on this ground:—*Held*, that the only legitimate objector being the officer of police, and there being no objection on his part before the Court, the Justices were bound to grant the certificate. *Reg.* (*Marshall*) v. *Justices of Tyrone* ([1896] 2 Ir. R. 15) followed. Upon any such application being made, and independently of and prior to considering any objections, the Justices are entitled to ascertain that the application is properly before them, and the conditions essential to their jurisdiction fulfilled, *i.e.* that the applicant is a person of full age, residing within the Petty Sessions District, and that the prescribed notice has been served within the prescribed time; and if, from the applicant's own statement, when called, any valid ground of disqualifications is disclosed, the Justices have power to call the attention of the officer of police thereto (if he be not already prepared to object), and to adjourn the hearing in order to allow him to make objection accordingly. *Reg.* (*Morgan*) v. *Justices of Tyrone* - Q. B. 318

—— *Bona fide* traveller—Public thoroughfare—Navigable arm of the sea—Purpose of journey - - - - - 404
See BONA FIDE TRAVELLER.

LIMITATIONS, STATUTE OF — *Landlord and tenant—Ejectment for non-payment of rent—3 & 4 Wm. 4, c. 27, sections 2, 14; 37 & 38 Vict. c. 57—Acknowledgment—Proposal by tenant to purchase his holding under the Land Purchase Acts given to solicitor having carriage in proceedings towards sale of the landlord's interest—Agent of person entitled — Effect of service of originating notice to fix fair rent, of amendment thereof by the Land Commission, and of fair rent order—Estoppel—Land Law* (*Ireland*) *Act*, 1881 (44 & 45 *Vict. c.* 49), *sect.* 8.] *S.* was tenant from year to year of *M.*, who died in 1874. In 1881 *S.* served on the agent, *W. M.*, an originating notice, directed to "the landlord, *per W. M.*," to have a fair rent fixed on his holding. By order of the Land Commission, dated 16th June, 1883, this notice was amended by naming *M.*'s devisees as landlords, and that Court, by order dated 29th June, 1883, fixed a judicial rent on the holding. *L.*, a legatee under *M.*'s will, having, in 1879, instituted a suit in Chancery for the administration of *M.*'s real and personal estate, naming *M.*'s devisees and others as defendants, and an order for sale having been made and the carriage given to *L.*'s solicitor, a proposal in writing by *S.* was on the 3rd December, 1890, sent to the said solicitor for the purchase of *S.*'s holding under the Land Purchase Act to be submitted to the Court (as was done). On the 3rd June, 1895, a civil bill in ejectment for non-pay-payment of rent was brought against *S.* in the name of a legal mortgagee of *M.*'s estate. *S.* had paid no rent for upwards of twelve years before action brought. On case stated by the Judge of Assize:—*Held*, that the proposal to purchase was an acknowledgment of title within 3 & 4 Wm. 4, c. 27, s. 14, and that the solicitor having carriage was an agent within the meaning of that section to receive it. *Per* O'Brien, J., that the acknowledgment given in the originating notice in 1881 must, when that notice was amended and acted on by the defendant in 1883, be taken to be acknowledgment given in 1883, and further that the fair rent order created a new starting point for the Statute of Limitations. *Johnston* v. *Smith* - Q. B. 82

2. —— *Rentcharge—Advance by Land Commission to enable tenant to purchase holding—Land Law* (*Ireland*) *Act*, 1881, *sect.* 24, *sub-sect.* 1 (*a*), *sect.* 28—*Purchase of Land* (*Ireland*) *Acts*, 1885 *to*

LIMITATIONS, STATUTE OF—*continued.*
1891—*Sale carried out by conveyance.*] A perpetual annuity of £300 a-year was charged on certain lands, but no payment on foot thereof was made after the 3rd May, 1881. On the 18th December, 1888, an originating statement, under Rule 2 of the Rules under the Land Purchase (Ireland) Acts (of the 5th December, 1887), was lodged by the owner of the lands for the purpose of selling to the tenants, but in the schedule of incumbrances annexed to the statement no reference was made to the annuity. Agreements for sale of portions of the lands were subsequently lodged, which stated that it was proposed to carry out the sales by means of conveyances, and the applications for advances were sanctioned in 1889. On the 10th September, 1894, the orders sanctioning the advances were rescinded, and the application for advances under the aforesaid agreements were dismissed, and fresh agreements, which had been entered into under the Purchase of Land (Ireland) Act, 1891, applying for advances of the same nominal amount in Guaranteed Land Stock as had been previously sanctioned in cash, and proposing to carry out the sales by vesting order, were lodged. On the 10th September, 1894, orders were made sanctioning the several advances applied for. In the final schedule of incumbrances no mention was made of the annuity of £300 a-year, and the annuitant having filed an objection:—*Held* (1), that the original proceedings for sale which commenced on the 18th December, 1888, terminated with the order of the 10th September, 1894, and that the fresh agreements and the orders sanctioning advances under them, dated the 10th September, 1894, were separate and distinct; (2) that the principle of *In re Colclough's Estate* (8 Ir. Ch. R. 330) and *In re Nixon's Estate* (Ir. R. 9 Eq. 7) is not applicable to sales by the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891, where the sale is proposed to be carried out by conveyance; and that consequently the claim to the annuity was barred by the Statute of Limitations. *In re Bateson's Estate* APP. 171

3. —— *Vesting Order — Mortgage — Arrears of Interest—Purchase of Land (Ireland) Acts, 1885 to 1891.*] A vesting order made by the Land Commission under the Purchase of Land (Ireland) Acts, 1885 to 1891, stops the Statute of Limitations running as from its date, in favour of all persons having charges on the lands in respect of which the vesting order is made. Arrears of interest directed to be paid on a mortgage for six years next preceding the making of vesting orders affecting the lands subject to the mortgage. *In re Smithwick's Estate* - - - - - LAND COM. 401

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MASSES—*Charitable bequest — Masses for the repose of testator's soul—Celebration publicly in Roman Catholic Church—Purpose merely charitable—5 & 6 Vict. c. 82, s. 38—Legacy duty—Exemption.*] A bequest to a Roman Catholic priest, to be applied for masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator's soul, is a valid charitable bequest, and exempt from legacy duty under the 38th section of the 5 & 6 Vict. c. 82. *Attorney-General* v. *Hull* - - - - - Ex. 291

MISREPRESENTATION IN PROSPECTUS — *Company — Shareholder — Repudiation of contract—Forfeiture of shares.*] The judgment of the Court of Appeal [1895] 2 I. R. 207, affirming the judgment of the Exchequer Division, affirmed by the House of Lords. *Aarons Reefs, Limited*, v. *Twiss* - - - - - - - H. L. 496

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PARLIAMENT — *Franchise — Registration — Freeman—Divided Borough—Change of Residence—Notice of Claim.*] It is not necessary for a freeman who, during the qualifying period, has changed his place of abode from a residence within one division of a borough to another within the borough or the seven miles limit to serve a fresh notice of claim. In the case of a divided borough, if the Revising Barrister find that the place of abode of a freeman is wrongly stated on the list, he is bound, on proof of the true place of abode, and that the same is within the qualifying radius, in the case of a duly qualified freeman, to correct the place of abode as stated in the list, and to assign the freeman to the right division for the purpose of voting. *Nagle* v. *Campbell* - - - - App. 326

2. —— *Franchise—Registration of voters—Inhabitant occupier—Landlord living on premises—Dwelling-house—Lodger.*] Where the Revising Barrister finds as a fact that a voter, during the qualifying period, separately occupied as a separate dwelling-house, two rooms on a flat in a tenement house, having the exclusive control of the said rooms, and the use of the stairs, yards, &c., in common with the other inmates of the tenement house, the fact that the landlord also resided in the house does not *per se* as matter of law disfranchise the voter. Where the inmates of such a house are otherwise duly qualified, in order to deprive them of the franchise as inhabitant householders, the landlord must so reside upon the premises as to retain his quality of master, reserving to himself a general control and dominion over the whole structure. *M'Laughlin* v. *Chambers* App. 497

PARTICULARS—*Practice—Action of seduction—Affidavit of merits.*] A defendant in an action for seduction is not entitled to call for particulars without making an affidavit of merits. Practice in this Division stated. *Hanna* v. *Keers* Ex. 226

2. —— *Practice—Slander of title—R. S. C., Order XIX., Rule 7.*] A statement of claim alleged that the defendant had slandered the plaintiff's title to certain lands by publishing certain words "just before the exposure to sale by auction of said lands," "whereby the persons desirous of purchasing were prevented from bidding," to the plaintiff's loss, &c.:—*Held*, that the defendant was entitled to an order that the plaintiff should furnish particulars of the occasions when and where such words were spoken, and also of the persons present on such occasions, and the best particulars she could give of the persons who were desirous of purchasing, and were prevented by reason of the words complained of. *Roche* v. *Meyler* - - - - - Q. B. 35

PASTORAL HOLDING—*Landlord and tenant—Land Law (Ireland) Act*, 1887—*Land Law (Ireland) Act*, 1881—*Holding let to be used mainly for purpose of pasture.*] A holding of nearly 200 acres was demised in 1877 to a trustee, who was a salesmaster, and who was, out of the profits of the land, to reimburse himself the expenses he might incur as such lessee. The lease contained a covenant not to erect, except with license of the landlord, any farmers' or labourers' dwellinghouses, or other messuages, a covenant to consume on the premises all hay and straw to arise thereon, and a covenant to labour, crop, and farm the premises in a husband-like manner in respect of the succession of crops, and so that at all times there should be at least 140 acres under grass. The holding had, ever since the date of the lease, been used as a pasture farm, and there were no farm buildings on the lands:—*Held*, by the Court of Appeal (reversing the decision of the Land Commission), that the holding was not let to be used mainly or wholly for the purpose of pasture. *Nicholson, Tenant; Trustees of the Marquis of Headfort, Landlords*

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PHARMACY ACTS — 38 & 39 *Vict. c.* 57; 53 & 54 *Vict. c.* 48—*Apprenticeship—Apprenticeship to limited Company carrying on business of pharmacists—"Firm of legally qualified pharmaceutical chemists"—"Firm"—"Person"—Statute—Regulations having, when duly approved of, the effect of statute*—Ultra vires.] The Pharmacy (Ireland) Act, 1875, which created the Pharmaceutical Society of Ireland, gives power to the council of that body to make regulations in regard to the examination of candidates, and generally "for all such other matters as may be necessary for the due execution of this Act." By section 17, "all regulations made under the authority of this Act," when approved by the Lord Lieutenant and Privy Council, and laid before Parliament, become "of the like force and effect as if they had been enacted in this Act." The Act then provides that examinations shall be held at which "all persons desirous of being registered as pharmaceutical chemists under the Act" may present themselves at such times and in such manner as may be prescribed by such regulations; and provides that every person who shall be duly examined in accordance with the provisions of the Act, and shall be certified by the examiners as qualified, shall be entitled to be registered under the Act as a pharmaceutical chemist. The council made regulations, which were duly approved and laid before Parliament requiring that candidates for the qualifying examination should produce a statutory declaration, signed by a pharmaceutical chemist, that such candidate had served as apprentice or assistant for four years "with and in the sole employment of such pharmaceutical chemist . . . or of a firm of legally qualified pharmaceutical chemists . . . of which the aforesaid pharmaceutical chemist is a member." These regulations also required a similar statutory declaration to be made by the candidate. *C.* served for more than four years as apprentice of a limited Company carrying on business as pharmaceutical chemists. Of the eleven members of this Company two only, *T. G.* and another, were registered pharmaceutical chemists, the business being managed and carried on by *T. G.* Both *T. G.* and *C.* made statutory declarations stating that *C.* had served for the requisite period as apprentice with and in the sole employ of the Company, describing the same as a firm of legally qualified pharmaceutical chemists. The council having refused to admit *C.* to examination, on the ground that these declarations were insufficient and invalid, *C.* obtained a conditional order for *mandamus*:—*Held*, that the order must be discharged, for, assuming (as had been assumed in the argument) that the regulations were *intra vires*, "Firm of legally qualified pharmaceutical chemists" meant "firm consisting of individuals legally qualified as such"; and that therefore the declarations were not and could not be sufficient. *Sed quære, per* O'Brien, Holmes, and Gibson, JJ., whether the regulations in question were not *ultra vires*. *Reg.* (*Cleeland*) v. *Pharmaceutical Society of Ireland* [Q.B. 368

PHARMACY ACTS—*continued.*

2. —— 38 & 39 *Vict. c.* 57, *s.* 30; 53 & 54 *Vict. c.* 48, *s.* 17—*Company carrying on business as pharmaceutical chemists—"Person"—Body corporate—Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 2—"*Contrary intention*"—*Statute.*] The defendants, a limited Company, carrying on business as pharmaceutical chemists, were prosecuted before Justices at Petty Sessions, under section 30 of the Pharmacy (Ireland) Act, 1875, for having compounded and sold medical prescriptions, they not being properly qualified in that behalf. That section provides that "it shall not be lawful for any person" to sell or keep open shop for retailing or compounding poisons or medical prescriptions, unless such person be registered as a pharmaceutical chemist or a chemist and druggist under the Act, and imposes on any person acting in contravention of this provision a penalty of £5. On Case Stated:—*Held*—following the decision of the House of Lords in *The Pharmaceutical Society* v. *London and Provincial Supply Association* (5 App. Cas. 857) upon the construction of the corresponding sections of the English Pharmacy Act of 1868 (31 & 32 Vict. c. 121. ss. 1, 15)—that *person* in the Act of 1875 did not include a body corporate, so as to make the defendants liable to the penalty imposed by sect. 30; and *held*, further, that, the contrary intention thus appearing on the face of the statute, the provision of the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 2), that, "in the construction of every enactment relating to an offence punishable on indictment or on summary conviction . . . the word *person* shall, unless the contrary intention appears, include a body corporate," was inapplicable. *Pharmaceutical Society of Ireland* v. *Boyd and Co.* - - - - - Q. B. 394

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PUBLIC HEALTH ACT — Township commissioners—Limit on rate - 126
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PUBLIC HOUSE—Bona fide traveller—Public thoroughfare—Purpose of journey 404
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PUBLIC PURPOSES—Property used for—Rating - - - - - - 538
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PURCHASE OF LAND (IRELAND) ACTS —*Owner of an insolvent estate—Tenant under the Court pending the matter—Proposal to purchase.*] Under a settlement, dated the 22nd June, 1848, in the events which had happened, *C. L.* was tenant for life of an estate which was insolvent. In 1880 *C. L.* presented a petition to the Land Judge's Court for a sale of the fee-simple, to pay the incumbrances, which exceeded £26,000. For three years prior to May, 1895, *C. L.* had been tenant under the Court of portion of the estate, comprising 922 acres at the rent of £383. On the 24th May, 1895, he obtained from the Land Judge a lease for seven years, pending the matter. On the 15th May, 1895, *C. L.* sent in a proposal to the Land Purchase Commissioners to purchase the said holdings at the price of £7620, agreeing to lodge £2620, and seeking an advance of £5000 from the Land Purchase Commissioners. The proposal was refused as not being within the Act. On appeal to the Court of Appeal:—*Held*, by the Lord Chancellor and Barry, L.J., that the Land Purchase Commissioners having, in the exercise of their discretion, refused the advance their order should be affirmed:—*Held*, by the Lord Chief Justice and Fitz Gibbon, L.J., that the person applying for the advance was not a tenant within the meaning of the Land Purchase Acts, and that the Commissioners had no jurisdiction to make the advance. *In re Lawrence's Estate* - - APP. 347

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RATES—*Hereditaments used exclusively for charitable or public purposes—Rating—Training College—Paying pupils—Rules of Commissioners of National Education*—15 & 16 *Vict. c.* 63, *s.* 16—17 & 18 *Vict. c.* 8, *s.* 2.] A parcel of land with buildings thereon was in the occupation of certain members of a Roman Catholic religious community, bound by a vow of poverty, and obliged by their rules to pay into the coffers of the community all proceeds derived from teaching after feeding and clothing themselves, which proceeds were applied for the purposes of education. The buildings consisted of a college, built at the expense of the community out of their own funds, for the training of young persons to become National teachers. Of these a certain number were admitted, subject to the sanction of the Commissioners of National Education, and supported and educated wholly out of a grant of £50 for each person made by the

RATES—*continued.*
Government, and sums received from the Government as rewards for proficiency. Besides these, certain pupils were admitted at a yearly fee of £50 each, for the purpose of being prepared to receive the sanction of the Commissioners of National Education, and thereby to come upon the public endowment. These yearly fees were applied for their maintenance, and any surplus was carried to the credit of the Commissioners, but there was no obligation on the part of the community to do so:—*Held*, that, having regard to the admission of the pupils paying such yearly fees, the College was not used exclusively for charitable or public purposes, and was not altogether of a public nature, and was therefore not exempt from rating. *Guardians of Waterford Union, Appellants*; *Barton (Commissioner of Valuation) and Brothers of De la Salle Training College, Respondents* Ex. 538

2. —— *Poor rate—Liability of owner of disused mill—Meaning of "occupier"*—1 & 2 *Vict. c.* 56, *ss.* 71, 124.] *M.*, the lessee of a corn mill, evicted, for non-payment of rent, her sub-tenants, who had been in occupation of the premises, and who had rebuilt the mill and provided new machinery for it. *M.* was in possession at the time when a rate was struck by the plaintiffs. *M.* had put a caretaker in charge, who kept the machinery in order, and the premises were advertised to be let by her as a going concern. *M.* had not used the premises as a mill at any time:—*Held*, on case stated (*diss.* Johnson, J.), that the Court was not bound to hold, as matter of law, that *M.* was in immediate use and occupation, so as to be liable as rateable occupier, within the meaning of 1 & 2 Vict. c. 56. *Guardians of Midleton Union* v. *M'Donnell* [Q. B. 228

3. —— *Township Commissioners—Urban sanitary authority—Public Health (Ireland) Act*, 1878 (41 & 42 *Vict. c.* 52), *sects.* 226, 227—*Towns Improvement (Ireland) Act*, 1854—*Special Act—Limit on rate—"Sanitary Acts."*] Town Commissioners, acting under a Special Act, which incorporated the Towns Improvement (Ireland) Act, 1854, the Gasworks Act, 1847, and certain provisions of the Waterworks Clauses Act, 1847, were also the Sanitary Authority of the township. The Special Act provided that the township rate should not exceed in any year 2*s.* in the pound without the consent of two-thirds of the ratepayers at a special general meeting. The Commissioners, without the prescribed consent, made a township rate of 2*s.* 6*d.* in the pound, not only for sanitary purposes but for all the purposes of the Special Act:—*Held* (affirming the judgment of the Exchequer Division), that the rate was bad. *Manly* v. *Young* App. 126

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RIVER—Weir not extending more than half way across - - - - - - 93
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SERVICE OUT OF THE JURISDICTION—*Practice—R. S. C. I., Order XI., Rule* 1 (f)—*Contract made within the jurisdiction—Discretion of the Court of first instance.*] The plaintiffs were contractors in Belfast, and the defendants were cement merchants in London. In September, 1888, *M.* a broker, who had an office in Belfast, called

SERVICE OUT OF THE JURISDICTION —*continued.*
on the defendants in London to negotiate for a supply of cement, to be delivered to the plaintiffs in the north of England, for some works, to be executed in England, upon which they were engaged. Some correspondence between plaintiffs and defendants ensued, in which some minor details of the proposed contract were discussed. *M.* (who, as the Court held, had the plaintiffs' authority to do so), on the 10th September, had an interview with the defendants in London, when he announced that the plaintiffs would agree to the defendants' terms, and orally accepted, on the plaintiffs' behalf, the offer made by the defendants; but it was contemplated by both parties and by *M.* that there should be a written contract, either of a formal character, as suggested by the plaintiffs and *M.*, or an acceptance in writing of a letter addressed by the defendants to the plaintiffs, which the defendants considered would be sufficient. In the result the plaintiffs wrote from Belfast on the 15th September to the defendants, accepting their offer (setting out specifically the terms agreed to by *M.* on the 10th). The defendants supplied cement to the plaintiffs until 1890, when they suspended the delivery, alleging that they were entitled, under the contract, to spread the delivery over a period of three years. The defendants alleged that this was a breach of the contract, and obtained leave from the Queen's Bench Division in Ireland to issue and serve a writ on the defendants out of the jurisdiction:—*Held*, by the Court of Appeal, (1) affirming the Queen's Bench Division, that the contract was made in Ireland, within the meaning of R. S. C. I., Order XI., Rule 1 (*f*); (2) that the Court of Appeal ought not to interfere with the discretion of the Court of first instance in allowing service out of the jurisdiction, unless it was manifest that the discretion had been wrongly exercised. *Semble*, however, *per* Fitz Gibbon, L. J., that the balance of convenience in the present case was in favour of a trial in England. *M'Crea* v. *Knight* - App. 619

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SUB-DIVISION—*Of holding—Landlord and tenant — Separate holding — Right to have fair rent fixed—Land Law (Ireland) Act*, 1881 (*44 & 45 Vict. c. 49*), *ss. 2, 20 (1)—Estoppel.*] *J. M.*, a tenant from year to year of a holding, to which the Land Act of 1881 applied, sold in 1887, with the permission of the landlord's agent, a part of the holding, consisting of 14 acres. The purchaser's name was entered in the landlord's books as tenant of the 14 acres he had bought, at an apportioned rent of £3. There was no consent in writing by the landlord to the sub-division of the original holding:—*Held* (1) that the landlord was estopped from alleging that the 14 acres did not form a separate holding; and (2) that the present tenancy in the 14 acres subsisting at the time of the sale had not been affected by the acts of acceptance, admission, or transfer, constituting the purchaser a tenant; and that the order of the Sub-Commission fixing the fair rent should be affirmed. *Boyd, Tenant; Tredenick, Landlord* LAND COM. 364

2. —— *Of holding—Landlord and tenant—Sub-division or sub-letting without the consent of the landlord in writing—Land Law (Ireland) Act*, 1881 (*44 & 45 Vict. c. 49*), *sect. 2.*] An assignment, by a tenant from year to year of a holding to which the Land Law (Ireland) Act, 1881, applies, of portion of such holding, is absolutely and for all purposes void, unless and until the landlord has consented thereto in writing, as required by sect. 2 of that Act. The defendant, a tenant from year to year of a holding to which the Act of 1881 applied, assigned by deed a portion of his holding to the plaintiff, and the landlord having refused his consent, the defendant gave the plaintiff his bond (of even date) for £90, the amount of the purchase-money, conditioned in the event of the plaintiff being disturbed in his possession, or sustaining loss because of the landlord's consent not having been obtained. The plaintiff entered into possession, and, being disturbed in his possession by the defendant, sued him on the bond, and at the trial obtained a verdict for £78. The landlord had throughout refused to give his consent to the sub-division. On new trial motion to the Queen's Bench Division, and on appeal therefrom to the Court of Appeal:—*Held*, that the assignment being absolutely void, and the defendant having it thus in his power to eject the plaintiff, and having in effect dispossessed him, the verdict was right. *Fogarty* v. *Shanahan* [Q. B. 273; APP. 286

SUBLETTING — *Landlord and tenant — Lease made in* 1828—*Consent by agent to assignment reciting possessions of undertenants—Receipts for rent and payments for privilege of subletting—Landlord at the time tenant for life—Consent in writing of heir or assign of lessor—Tenant in occupation—Subletting Act* (*7 Geo. 4, c. 29*), *s. 3—Land Law (Ireland) Act*, 1881 (*44 & 45 Vict. c. 49*), *s. 57.*] The tenant under a lease made in 1828, and to which the provisions of section 3 of the Subletting Act, 7 Geo. 4, c. 29, applied, purported without deed or written instrument to make sublettings of portions of the holding. By deed made in 1862 the landlord's estate was settled in trust for *W.*, who

SUBLETTING—*continued.*
was heir-at-law of the original lessor, and his assigns, for his life, with remainders over. The tenant was charged an additional rent for the privilege of having the subtenants, and in receipts for rents given in 1866 and 1867 by the agent of *W.* there was an item of 15*s.* for six cottiers. In an assignment made in 1878 of the tenant's interest the lands were described as in the actual possession of the tenant and his undertenants, and a consent signed by the agent of *W.* was indorsed thereon. In 1883 and 1889 fair rents were fixed on the applications of some of the subtenants. In an application after the death of *W.* to have the fair rent of the holding fixed:—*Held*, that *W.* was competent to give the consent to the sublettings required by 7 Geo. 4, c. 29, s. 3, either as heir or assign of the lessor; that there was evidence that the sublettings were made with his express consent; that his consent could be given through his agent; and that the receipts coupled with the terms of the assignment of 1878, and the consent endorsed thereon, sufficiently testified in writing the landlord's consent to the sublettings:—*Held*, also, distinguishing *Stevenson* v. *Parker* ([1895] 2 I. R. 504) that the Court would, if necessary, under the circumstances of the case presume a lost consent in writing by *W.* to the sublettings. *Robinson, Tenant*; *Wakefield Landlord* - LAND COM. 194

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SURVIVOR—*Will — Construction — Surviving children — "Surviving" read "other" — Settled shares—Stirpital construction.*] A testator devised to his son *M.* the lands of *A.*, charged with an annuity of £200 for his son *H.*, and bequeathed to his son *T.* the lands of *S.*, held for a term of years, charged with an annuity of £100 for his son *H.*; and he declared that the several bequests to his sons *M.* and *T.* should be for their life-use only, and after the decease of each of his said sons the estate or property bequeathed to him should, subject as aforesaid, go to such one or more children of such son respectively, exclusive of the other or others of the children of such son, for such estates as such son should by deed or will appoint, and with such provisions as he should think proper to charge for a wife or children. And for default of such limitations, then to the use of all his children, share and share alike, as tenants in common, and to their respective heirs, executors, administrators, and assigns. And upon the death of either of his sons *M.* and *T.*, without leaving any child or children, or grandchild or grandchildren, him surviving, the property bequeathed to such son so dying, should, subject as aforesaid and to any jointure created by such son for a wife, go over to the survivor of them the said *T.* and *M.*; such

SURVIVOR—*continued.*
survivor in such case taking also a life estate only in said lands, with power of appointment to his children, and with remainder to his children in default of appointment, and with such power of jointuring and charging for his wife and children as thereinbefore given to them in respect of the properties thereinbefore specifically given to them, and to go over in default of appointment as in case of their own original shares; and in case of the death of both of them the said *M.* and *T.* without leaving any child or children, grandchild or grandchildren, him surviving, the testator directed that the estates bequeathed to *M.* and *T.* respectively should, subject as aforesaid, go over to his son *H.* for such life estate, with such power of appointment to his children, and with such remainder to his children in default of appointment, and with such power of jointuring for a wife and of charging money thereon for his children as was thereinbefore given to *M.* and *T.*; and in case all his sons should die without leaving child or children, grandchild or grandchildren, them surviving, the properties bequeathed to his sons respectively should go to his daughters Mary and Emma, their heirs, executors, administrators, and assigns. The testator left him surviving his three sons, *M.*, *T.*, and *H.* *M.* died on the 15th March, 1878, leaving a daughter Mary, who died in 1881, when three years old. *H.* died on the 23rd November, 1878, leaving two sons Timothy and Henry Donat. *T.* died in 1892, unmarried, and after his death Timothy and Henry Donat took possession of the lands of *S.* *C.*, the widow of *M.* obtained letters of administration to her daughter Mary, and brought an ejectment against Timothy and Henry Donat to recover the lands of *S.*:—*Held*, by the Exchequer Divison and by the Court of Appeal, that the word "survivor" in the gift over upon the death of *T.*, without leaving child or grandchild, must be read "other," and that the plaintiff was, therefore, entitled to recover. *O'Brien* v. *O'Brien* - - EX. 459; APP. 476

TEMPORARY CONVENIENCE—*Landlord and tenant—Tenancy from year to year—Subsequent agreement before* 1881 *that landlord might take up premises for building purposes—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49), s. 58 (7).] In considering whether a holding was let for the temporary convenience or to meet a temporary necessity either of the landlord or tenant within section 58, sub-section 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49) regard must be had to what were the subsisting terms of the letting at the passing of the Act. In January, 1871, the landlord of agricultural lands, held from him under a tenancy from year to year, and situate in a locality in which a demand had sprung up for sites for residences, made an agreement with the tenant

TEMPORARY CONVENIENCE—*continued.*
by which the landlord was to be at liberty at any time, and without any formal notice, to take up possession of the lands, and to grant leases thereof for building or for any purpose whatsoever, except farming leases, the landlord making a reduction in the rent and a payment for taking possession. On an application by the tenant to have a fair rent fixed:—*Held*, that regard should be had not only to the original terms of the contract of letting, but to the special terms introduced by the subsequent agreement; and, the Court being of opinion, under the circumstances, that at the time the Act of 1881 came into operation, the holding was let for the temporary convenience of the landlord—*Held*, that the originating notice should be dismissed. *Thompson, Tenant*; *Cleland, Landlord*
[Land Com. 190

—— Letting for life of lessee - - 512, 521
See Compensation.

TENANCY — Notice to sell — Pre-emption—Value - - - - - 37, 356
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TENANCY FROM YEAR TO YEAR—Subsequent agreement before 1881 that landlord might take up possession for building
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TITHE RENTCHARGE — *Application by "three or more persons" to vary—Application by two individuals, one of them applying as trustee of certain lands, and also as beneficial owner of other lands — "The corn principally grown" — Order based on price of wheat and oats taken together — Posting of statutory notices — Form of order—4 Geo. 4, c. 99, s. 43 — 1 & 2 Vict. c. 109, s. 32—Jurisdiction of justices—Order drawn up and signed, subsequently to the hearing and without adjournment, out of Quarter Sessions.*] An application to vary a tithe rentcharge on notice signed by two individuals—one of them signing twice, once "as trustee for *X Y*" of certain lands, and again in his personal capacity as beneficial owner of other lands within the parish liable to the charge—is not an application by "three or more persons" within 1 & 2 Vict. c. 109, s. 32; and a writ of *certiorari* was issued accordingly, to quash an order of Quarter Sessions founded thereon, varying such tithe rentcharge, the Justices having had no jurisdiction to enter upon the inquiry in the absence of due notice as required by the statute. *Per* O'Brien, J.: Where the certificate of composition is silent as to the species of corn on which it is based, it is

TITHE RENTCHARGE—*continued.*
competent to the Justices, on proper evidence, to vary tithe rentcharge on the basis of more than one species, *e.g.* "wheat and oats, as being the corn principally grown in the county"; and (the measure of these differing) the computation should be made on the average price of the barrel, as a unit. Justices at Quarter Sessions, having heard an application to vary tithe rentcharge, ruled that the applicants were entitled to an order reducing the charge on a certain basis of calculation, and (but without any order of adjournment) directed that a draft order should be prepared by the applicants and submitted to them, and that the clerk of the peace should make the necessary calculations to ascertain the amount of the reduction; and subsequently, when the order had been so made up, signed same out of Quarter Sessions, though dated as of the day of the hearing:—*Held, per* O'Brien, Holmes, and Gibson, JJ., that the terms of the order, and the amount of the variation, not having been publicly ascertained and declared at the Sessions, or at an adjournment thereof, the order was bad, and should be quashed. *Reg.* (*O'Ferral*) v. *Justices of the Co. Meath* - - - Q. B. 1

2. —— *First estate of inheritance—Lease for lives renewable for ever made in* 1851*—Payment by owner in fee—Dispossession or discontinuance of receipt—Statute of Limitations.*] An owner in fee-simple, by deed dated the 17th September, 1851, purported to demise certain lands for lives renewable for ever. Notwithstanding this deed the owner in fee paid the tithe rentcharge up to the 1st November, 1886. In an action for subsequent tithe rentcharge against the person entitled to the estate created by the deed of 1851, of which, up to 1886, the owners of the tithe rentcharge had no notice. *Held*, 1st, that the defendant was the owner of the first estate of inheritance in the lands so as to render him liable to pay the tithe rentcharge; 2ndly, that the tithe rentcharge was not barred by any Statute of Limitations. *Adnam* v. *Earl of Sandwich* (2 Q.B.D. 485) followed. *Irish Land Commission* v. *White*
[Ex. 410

3. —— "*Perpetual estate or interest*"*—Lessee for lives renewable for ever continuing in possession after death of* cestui que vies*—1 & 2 Vict. c. 109, ss. 7, 8.*] A lessee under a lease for lives renewable for ever, continuing in possession after the lives named in the lease have been allowed to drop without renewal, but still possessing the right to renew, is an owner of a "perpetual estate or interest" within 1 & 2 Vict. c. 109, ss. 7, 8, and he, not his lessor, is liable to tithe rentcharge under that section. *Henderson* v. *Dean of Londonderry* (2 Cr. & Dix. 494) followed. *Irish Land Commission* v. *Rowntree* - - - - - Gibson, J. 442

TITLE—Fixed net—Inquiry—Appeal - 40, 57
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VALUE OF TENANCY—*Landlord and tenant—Notice by tenant of intention to sell tenancy—Election by landlord to purchase—True Value—Land Law (Ireland) Act*, 1881 (44 & 45 *Vict. c.* 49, *s.* 1 (3)).] The true value of a tenancy within the meaning of sect. 1, sub-sect. 3, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), is not restricted to the value of the improvements on the holding made by the tenant or his predecessors in title, for which he has not been paid or compensated by the landlord. The principles expressed by Mr. Trench, Q.C., in *Ager* v. *Sealy* (27 Irish Law Times, 63) approved and adopted. *Curneen, Tenant*; *Tottenham, Landlord*
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THE END.